80-1556

Office-Supreme Court, U.S.
FILED
MAR 12 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax
Attorney
Division of Inheritance
& Gift Tax
107 South Broadway
Los Angeles, CA 90012

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE,
NEMEROVSKI, CANADY &
POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK THOMAS,
WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8442
Attorneys for Petitioners

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a dispute between states as to which state was the domicile of a decedent for death tax purposes is a "controvers[y] between two . . . States" within the Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a), so as to preclude such a dispute from being entertained by a federal district court pursuant to the Federal Interpleader Act.

2. Whether the Federal Interpleader Act grants district courts jurisdiction to resolve controversies between two states concerning their conflicting domicile-based inheritance tax claims, notwithstanding the fact that neither states nor their taxing officials are "citizens of a state" for purposes of diversity and interpleader jurisdiction.

3. Whether an interpleader claimant with an interest in the fund at issue is a "claimant" within the meaning of the Federal Interpleader Act, so as to establish federal jurisdiction with a $500 jurisdictional minimum (and nationwide service of process) in cases where the only parties to the action are the stakeholder plaintiff and one claimant defendant who is a citizen of a diverse state.

4. Whether the Court of Appeals erred in summarily refusing to consider the effect of a change in state law rendered after its decision which deprived the federal courts of jurisdiction over this action, in violation of the rule enunciated in *Huddleston v. Dwyer,* 322 U.S. 232 (1944).

5. Whether, in a controversy between two states over their conflicting domicile-based inheritance tax claims, venue should be transferred so that the action may be heard in a forum whose residents have no personal interest in the cause of one of the claimant states.

PARTIES

There are two petitioners, each appearing in his official capacity: Kenneth Cory, the Controller of the State of California, and H. B. Alvord, the County Treasurer of the County of Los Angeles. Respondents include Mark White, the Attorney General of the State of Texas; Bob Bullock, the Comptroller of the State of Texas; William Rice Lummis, as Texas Administrator of the Estate of Howard R. Hughes, Jr. (the Estate), as Nevada Co-Special Administrator of the Estate, as Louisiana Provisional Administrator of the Estate, and as Delaware Ancillary Administrator of the Estate; Richard Gano, the California General Administrator of the Estate; the First National Bank of Nevada, the Nevada Co-Special Administrator of the Estate; and the United States of America.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE WRIT SHOULD BE GRANTED SO THAT THE COURT CAN DETERMINE THE APPROPRIATE FORUM TO RESOLVE INTERSTATE DEATH TAX CONTROVERSIES	6
A. The Federal Interpleader Act Cannot Give a District Court Jurisdiction to Consider Death Tax Domicile Controversies Between States Because Such Cases Are Within This Court's Original Jurisdiction	7
B. Jurisdiction Cannot Be Invoked Under the Federal Interpleader Act to Resolve Death Tax Domicile Controversies Between States Because States Are Not "Citizens of a State" for Purposes of Diversity and Interpleader Jurisdiction	9
C. Interpleader Should Not Be Used to Resolve Death Tax Domicile Controversies Between States Because It Requires States to Submit Their Tax Claims to Jurors Who Will Be Citizens of a Rival Claimant State	12
II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' HOLDING THAT THE CITIZENSHIP OF A STAKEHOLDER SHOULD BE CONSIDERED IN DETERMINING WHETHER INTERPLEADER JURISDICTION EXISTS, A RULING WHICH RADICALLY EXPANDS FEDERAL JURISDICTION	15

PAGE

III. THE WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS' FINDING OF JURISDICTION HAS BEEN SUPERSEDED BY CHANGES IN CALIFORNIA LAW 18

IV. THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION REQUIRING CALIFORNIA, A SOVEREIGN STATE, TO SUBMIT ITS TAX CLAIM TO A JURY COMPOSED OF CITIZENS OF TEXAS, A RIVAL STATE 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES	PAGES
Adams Express Co. v. Denver & Rio Grande Railway, 16 F. 712 (C.C.D. Colo. 1883)	20
Alderman v. Elgin, J. & E. Ry. Co., 125 F.2d 971 (7th Cir. 1942)	20
Allen v. Flournoy, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972)	23
Allstate Insurance Co. v. Lumbermen's Mutual Casualty Co., 204 F. Supp. 83 (D. Conn. 1962)	20
Arizona v. New Mexico, 425 U.S. 794 (1976)	8
Bry-Man's, Inc. v. Stute, 312 F.2d 585 (5th Cir. 1963)	24
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F. Supp. 485 (D. Md. 1962)	17
California v. Texas, 437 U.S. 601 (1978)	3, 4, 6, 7, 9
Chance v. County Board of School Trustees, 332 F.2d 971 (7th Cir. 1964)	20
Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793)	13
Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976)	20
Connally v. Georgia, 429 U.S. 245 (1977)	26
Craig v. Southern Natural Gas Co., 125 F.2d 66 (5th Cir. 1942)	10
Dakota Livestock v. Keim, 552 F.2d 1302 (8th Cir. 1977)	19
DeMiglio v. Paez, 189 N.Y.S. 2d 593, 18 Misc. 2d 914 (1959)	8
Drumright v. Texas Sugarland Co., 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927)	20
Edelman v. Jordan, 415 U.S. 651 (1974)	4, 6
Epperson v. United States, 490 F.2d 98 (7th Cir. 1973)	25
Fetzer v. Cities Service Oil Co., 572 F.2d 1250 (8th Cir. 1978)	20
Finn v. American Fire & Casualty Co., 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954)	20
Forest Oil Co. v. Crawford, 101 F. 849 (3d Cir. 1900)	20, 21
Friedberg v. Santa Cruz, 86 N.Y.S. 2d 369, 274 App. Div. 1072 (1949)	8
Fryer v. Weakley, 261 F. 509 (8th Cir. 1919)	20
Gaddis v. Junker, 27 F.2d 156 (E.D. Tex. 1928)	20
Grady v. Irvine, 254 F.2d 224 (4th Cir. 1958), *cert. denied*, 358 U.S. 819 (1958)	21
Haas v. Jefferson National Bank, 442 F.2d 394 (5th Cir. 1971)	20
Hoffman v. Blaski, 363 U.S. 335 (1960)	13, 14
Huddleston v. Dwyer, 322 U.S. 232 (1944)	22
Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952)	21

CASES	PAGES
Hunt Tool Co. v. Moore, Inc., 212 F.2d 685 (5th Cir. 1954)	21
Johnson v. Riverland Levee District, 117 F.2d 711 (8th Cir. 1941)	21
Kansas City Southern R.R. Co. v. Morley, 88 F. Supp. 300 (W.D. Ark. 1950)	10
Kendrick v. Kendrick, 16 F.2d 744 (5th Cir. 1926), *cert. denied*, 273 U.S. 758 (1927)	20
Kennametal, Inc. v. International Union, 161 F. Supp. 362 (W.D. Pa. 1958)	19
Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948)	20
Lipscomb v. Lipscomb, 265 F.2d 822 (D.C. Cir. 1959)	13
Marshall v. Jerrico, Inc., —U.S.—, 48 U.S.L.W. 4485 (April 28, 1980)	26
In re Murchison, 349 U.S. 133 (1955)	29
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	13
Pan American Fire & Casualty Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960)	17
Pennsylvania v. New York, 407 U.S. 206 (1972)	9
People ex rel McColgan v. Bruce, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942)	10
Postal Telegraph Cable Co. v. Alabama, 155 U.S. 483 (1894)	10
Preiser v. Rodriguez, 411 U.S. 475 (1973)	8
Publicker Industries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065 (3d Cir. 1979)	20
Query v. 206 Cases of Assorted Liquor, 49 F. Supp. 693 (W.D.S.C. 1943)	10
Ralli-Coney, Inc. v. Gates, 528 F.2d 572 (5th Cir. 1976)	20
Reynolds v. Wabash R.R. Co., 236 F.2d 387 (8th Cir. 1956)	20
Riley v. Worcester County Trust Co., 89 F.2d 59 (1st Cir. 1936), *aff'd on other grounds*, 302 U.S. 292 (1937)	10
Rippey v. Denver United States National Bank, 42 F.R.D. 316 (D. Colo. 1967)	21
Robertson v. Ingram-Day Lumber Co., 271 F. 1023 (5th Cir. 1921)	10
Robertson v. Jordan River Lumber Co., 269 F. 606 (5th Cir. 1921)	10
Ross v. Bernhard, 396 U.S. 531 (1970)	13
Shafer v. Children's Hospital Society, 265 F.2d 107 (D.C. Cir. 1959)	13
Smith v. Allwright, 321 U.S. 649 (1944)	15
Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951)	8

CASES — PAGES

State Highway Commission v. Utah Construction Co., 278 U.S. 194 (1929) 10
State Water Control Board v. Washington Suburban Sanitary Commission, 61 F.R.D. 588 (D.D.C. 1974) 8, 9
Texas v. Florida, 306 U.S. 398 (1939) 3
Texas v. New Jersey, 379 U.S. 674 (1965) 9
Treines v. Sunshine Mining Co., 308 U.S. 66 (1939) 11
Tumey v. Ohio, 273 U.S. 510 (1927) 26
United States v. Will, — U.S. —, 49 U.S.L.W. 4045 (December 15, 1980) 26
Wallace v. Knapp-Monarch Co., 234 F.2d 853 (8th Cir. 1956) 20
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 26
Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 8
Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888) 13
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 4, 6
Wormley v. Wormley, 8 Wheat. (21 U.S.) 421 (1823) 10

STATUTES

A.B. 2092, CH. 634, CAL. STATS. 1980 ..... 3, 6, 18
CAL. REV. & TAX. CODE § 14104 ..... 3, 6, 19
CAL. REV. & TAX. CODE § 14791 ..... 3, 6, 18
CAL. REV. & TAX. CODE § 14793-95 ..... 3, 6, 18
28 U.S.C. 1251(a) 2, 7, 8
28 U.S.C. 1292(b) 4
28 U.S.C. § 1332(a) 16
28 U.S.C. 1335 ..... 3, 6
28 U.S.C. § 1335(a) 2, 15
28 U.S.C. § 1346(a)(1) 13
28 U.S.C. § 1397 ..... 12, 13, 16, 24
28 U.S.C. § 1401(a) 13, 23, 24
28 U.S.C. § 2361 16
28 U.S.C. § 2402 13

OTHER AUTHORITIES

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1681 (4th ed. 1873) 13
6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 1556 (1971) 9, 10
3A MOORE'S FEDERAL PRACTICE ¶ 1704 (1979) 10
STATE OF TEXAS 1977 ANNUAL FINANCIAL REPORT 18-19 25

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, the Controller of the State of California (Kenneth Cory) and the County Treasurer of the County of Los Angeles (H. B. Alvord), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 27, 1980.[1]

[1] This Petition is intended to be considered together with the Motion for Leave to File Complaint in *California v. Texas*, No. ____, Original, filed concurrently with this Petition.

OPINIONS BELOW

The Court of Appeals opinion is reported at 629 F.2d 397 (5th Cir. 1980) and is reprinted as Appendix "A" in the separately bound volume of appendices filed herewith (hereafter cited as "App."). The order denying a petition for rehearing is noted at 634 F.2d 630 (5th Cir. 1980), and is reprinted as Appendix "B". The order denying Petitioners' Motion for Leave to File Petition for Rehearing Out of Time is unreported and appears as Appendix "C".

The opinion of the District Court is reported at 491 F. Supp. 5 (W.D. Tex. 1979) and appears as Appendix "D". The District Court's prior orders denying Petitioners' Motion to Add Defendants and their Motion to Change Venue are unreported and are reprinted as Appendices "E" and "F", respectively. The District Court's order and judgment dismissing the action are reprinted as Appendices "G" and "H".

JURISDICTION

The Court of Appeals rendered its decision in this case on October 27, 1980. A timely petition for rehearing was denied on December 12, 1980, and this Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The principal statutes involved in this case are 28 U.S.C. § 1251(a) and 28 U.S.C. § 1335(a). 28 U.S.C. § 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

28 U.S.C. § 1335(a) provides in relevant part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

This case also involves Sections 14104, 14791, and 14793-95 of the California Revenue and Taxation Code as well as Chapter 634 of the 1980 California Statutes, which made certain changes in these statutes. The relevant provisions of the California Revenue and Taxation Code and of Cal. Stats. 1980, Chap. 634 are set out in Appendix I.

STATEMENT OF THE CASE

This action was brought under the Federal Interpleader Act (28 U.S.C. § 1335) by Respondent William Rice Lummis, the Texas Administrator of the Estate of Howard R. Hughes, Jr. ("the Estate").[2] The principal Defendants named in the Complaint are the inheritance tax officials of California and Texas.[3] The First Amended Complaint asserts that these officials are seeking to tax the Estate on the basis of inconsistent claims that each of their respective states was Howard Hughes' domicile at death and requests the District Court to adjudicate the issue of domicile.

Before the present action was brought, California sued Texas in this Court, invoking the Court's original jurisdiction in reliance upon *Texas v. Florida*, 306 U.S. 398 (1939). In June, 1978, California's Motion for Leave To File Complaint was denied. *California v. Texas*, 437 U.S. 601 (1978). The Court gave no reason for denying the motion, but four Justices

---

[2] At the time the Complaint was filed, there were two Administrators of the Estate in Texas and both were named as Plaintiffs. Since that date, however, one of the two Texas Administrators has died. The remaining Administrator, Respondent William Rice Lummis, continues to serve as the sole Texas Administrator of the Estate and the sole Plaintiff.

[3] Also named as Defendants are the United States, the County Treasurer of the County of Los Angeles, and the Administrators of the Estate in Nevada, California, Louisiana, and Delaware. Because it found that all the Administrators had identical interests, the District Court realigned all the Administrators as Plaintiffs. App. 3d. Plaintiff did not appeal from this determination nor did the Court of Appeals question this aspect of the District Court's decision.

The County Treasurer of Los Angeles was named as a Defendant because, at the time the complaint was filed, California law provided that he would receive a tiny percentage of the Estate if Hughes were determined to have been a California domiciliary. CAL. REV. & TAX. CODE §§ 14104,14795. These statutes were later amended to remove the County Treasurer from California's inheritance tax procedure. CAL. STATS. 1980, CHAP. 634, § 15.2, 28-32; *see* App. 19i, 36i. Because of this revision, the County Treasurer will no longer receive any funds from the Estate, even if Hughes is adjudged to have been a California domiciliary.

suggested in concurring opinions that resort to the original jurisdiction was unnecessary inasmuch as a determination of Hughes' domicile might be obtained in a federal district court pursuant to the Federal Interpleader Act.[4]

Three weeks after the decision in *California v. Texas*, the Estate filed the present action in the United States District Court for the Western District of Texas. Soon after the complaint was filed, the District Court entered a temporary restraining order prohibiting California and Texas from pursuing domicile-based inheritance tax claims in the courts of their own states or in any other forum. This injunction was later continued by the Fifth Circuit.

Petitioners made two related motions in the fall of 1978. First, they asked the District Court to enter an order adding as defendants some twenty-two persons whom Respondent Lummis himself had recognized as the heirs of Howard Hughes. Second, they moved for an order transferring the action to a neutral forum—the District of Colorado—which all parties concede was not the domicile of Hughes. Petitioners urged this case should not be heard in a forum whose jurors would have—through their residency and their interest in the treasury of their state's government—a personal interest in the outcome. Both of these motions were denied by the District Court in November, 1978.[5]

Following these decisions, Petitioners filed a Motion to Dismiss, which was heard in tandem with a motion to dismiss previously filed by the Texas taxing officials. In July, 1979, the District Court issued an order granting the motions, finding that subject-matter jurisdiction under the Federal Interpleader Act had not been established. App. "D". The court concluded that

---

[4] Although the Court had previously ruled in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) that such an action was barred by the Eleventh Amendment, the concurring Justices in *California v. Texas* suggested that this holding had been undercut by *Edelman v. Jordan*, 415 U.S. 651 (1974). *See California v. Texas*, 437 U.S. at 601 (Brennan, J., concurring), at 608 n. 10 (Stewart, J., concurring), and at 615 (Powell, J., concurring).

[5] These orders were later withdrawn and reissued by the District Court, with the revised orders adding a certification under 28 U.S.C. § 1292(b). The Court of Appeals later held that this certification was unnecessary since these orders were merged into the District Court's final order of dismissal; as a result, the appellate court eventually reviewed the merits of these rulings. The orders reprinted in Appendices F and G are the revised orders.

although the First Amended Complaint named some ten defendants, there was only one defendant—the County Treasurer of Los Angeles—who was both a "claimant" to property in Plaintiff's custody or possession and a "citizen of a state" for diversity purposes.[6] *Id.* 3d-5d. The court thus held that the jurisdictional prerequisites established by Section 1335 had not been met. Respondent Lummis appealed from this order and Petitioners cross-appealed, contending that the District Court's denial of their motions to add parties and change venue was erroneous.

On appeal, the Fifth Circuit reversed the District Court's finding of lack of interpleader jurisdiction, but affirmed its orders denying Petitioners' motions. App. "A". The court held that Respondent Lummis, as Texas Administrator of the Estate, is a "claimant" under the interpleader statute, and that "the citizenship of an interested stakeholder [*i.e.* Lummis] may be considered for purposes of establishing diversity under section 1335." *Id.* 11a. Since Respondent Lummis' citizenship was diverse to that of the County Treasurer of Los Angeles, the court held that interpleader jurisdiction was established. *Id.* 11a-12a. On the issues presented by California's cross-appeal, the court held that joinder of the prospective heirs was unnecessary (*id.* 12a) and that the District Court did not "abuse its discretion in denying the transfer of venue motion." *Id.* 4a n.5. A timely Petition for Rehearing was denied on December 12, 1980. App. "B".

On January 16, 1981, Petitioners filed a second Petition for Rehearing, together with a motion for leave to file that petition out of time. This petition was based on a recently enacted California statute which, as part of a general overhaul of the state's inheritance tax law, eliminated the interest of the County

---

[6] Although the Texas taxing officials are also interpleader "claimants", the District Court held that they were not "citizens of a state" for purposes of diversity jurisdiction. App. 4d; *see* pp. 9-10, *infra*. As to the remaining defendants (*see* note 3, *supra*), the court found that the United States was similarly not a "citizen of a state" for diversity purposes and held that the Defendant Administrators were not "claimants" to money or property of the Estate. App. 2d-3d.

Treasurer of Los Angeles in the Hughes estate.[7] Petitioners urged that this change in California law warranted dismissal of the action. Since the Court of Appeals had determined that the County Treasurer was one of the two adverse and diverse claimants required for interpleader jurisdiction, Petitioners contended that the court's jurisdiction had been dissipated because the County Treasurer was no longer an interpleader "claimant," leaving only one such claimant who was also a citizen of a state (Respondent Lummis). Petitioners' motion for leave to file the out of time petition for rehearing was summarily denied on January 23, 1981. App. "C".

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED SO THAT THE COURT CAN DETERMINE THE APPROPRIATE FORUM TO RESOLVE INTERSTATE DEATH TAX CONTROVERSIES.

The ultimate issue presented by this Petition is how interstate controversies regarding multiple domicile-based death tax claims shall be resolved. In *California v. Texas*, 437 U.S. 601 (1978), four Justices suggested that the Federal Interpleader Act (28 U.S.C. § 1335) might provide a jurisdictional basis for federal adjudication of such disputes since the Eleventh Amendment bar to such actions created by *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), had been removed by *Edelman v. Jordan*, 415 U.S. 651 (1974). *California v. Texas*, 437 U.S. at 601 (Brennan, J., concurring), at 608 n. 10 (Stewart, J., concurring), and at 615 (Powell, J., concurring).

Because the concurring opinions in *California v. Texas* focused solely on whether interpleader jurisdiction was consistent with the Eleventh Amendment, they did not consider whether other jurisdictional problems would prevent federal

[7] The statute (AB 2092) repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment of inheritance taxes in the first instance to the County Treasurer and retention by him of a "commission" to cover expenses of collection) and amended Section 14104 of the California Revenue and Taxation Code to require payment of the tax to the State controller. AB 2092, §§ 15.2, 28-32; *see* App. 19i, 36i. These provisions "apply to all estates, effective January 1, 1981." *Id.* § 46; *see* App. 38i.

statutory interpleader from being used to resolve interstate death tax controversies. Nor did they discuss the practical problems which such an invocation of federal interpleader jurisdiction would cause. This is hardly surprising, since both parties to *California v. Texas* assumed the continuing validity of *Worcester County*, and the problems which might be created by using federal interpleader to resolve interstate death tax controversies were neither briefed nor discussed at oral argument in that case.

The subsequent course of the Hughes estate litigation since *California v. Texas* has made clear, however, that wholly apart from the Eleventh Amendment, federal interpleader is neither an available nor a suitable means of resolving such controversies. It is not *available* (a) because such cases are interstate controversies within this Court's exclusive original jurisdiction; and (b) because the state taxing officials who necessarily will be the principal defendants in such actions are not citizens of a state under the diversity statute and thus are not within the jurisdictional perimeters of the Federal Interpleader Act. It is not *suitable* because federal interpleader will in most cases force contending states to litigate their death tax claims before jurors who are citizens of a rival claimant state.

A. The Federal Interpleader Act Cannot Give a District Court Jurisdiction To Consider Death Tax Domicile Controversies Between States Because Such Cases Are Within This Court's Exclusive Original Jurisdiction.

The use of federal interpleader to resolve the conflicting domicile claims of two states conflicts with 28 U.S.C. § 1251(a) which gives the Court "original *and exclusive* jurisdiction of *all* controversies between two or more States." (Emphasis added). The very purpose of the interpleader actions envisioned by the concurring opinions in *California v. Texas* is to eliminate the possibility of multiple taxation. *See California v. Texas*, 437 U.S. at 608 n.9 (Stewart, J., concurring). This necessarily means that, if one state wins, the other loses. Interpleader thus locks the competing states in an adversarial position, and so creates an interstate controversy of the most concrete kind. Since such controversies must, by law, be

resolved exclusively by this Court,[8] the use of interpleader jurisdiction in a federal district court for that purpose is improper.[9]

The escheat cases decided by the Court support this proposition. In *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), the Court stated that one state's claim against another for escheated property could only be maintained within the original jurisdiction. *Id.* at 443. And, despite the unsupported suggestion in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), that such controversies might "under some circumstances" be referred to the district courts (*id.* at 79), the Court has consistently accepted jurisdiction of cases where

---

[8] The statutory grant of exclusive jurisdiction to the Court over "*all* controversies between two or more States" (emphasis added) so obviously precludes other courts from adjudicating such disputes that it is not surprising to find a dearth of authority in this Court supporting the proposition that the statute means what it says. When attempts have been made to file cases within the Court's original and exclusive jurisdiction in the lower courts, however, they have been unequivocally rejected. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974); *Friedberg v. Santa Cruz*, 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *DeMiglio v. Paez*, 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959).

Arizona v. New Mexico, 425 U.S. 794 (1976), is not to the contrary. There the Court denied Arizona leave to file a bill of complaint seeking to invalidate a tax imposed by New Mexico on the New Mexico generating facilities of three Arizona utilities. The Court held that resort to the original jurisdiction was unnecessary, because the issues which Arizona sought to tender to the Court were being litigated in the New Mexico state courts by the affected utilities. The Court also was "not unmindful that the legal incidence of the electrical energy tax [was] upon the utilities" (*id.* at 797-98), not the state itself. A real interstate controversy thus probably was not present.

The present case is quite different. Here there is no doubt that it is the state itself—and not a third party—which is the real party in interest, since if Texas prevails in the interpleader action, the money which California directly receives by way of inheritance taxes will be adversely affected. Nor does California have any surrogates—like the Arizona utilities in *Arizona v. New Mexico*—to plead its case in some other forum, even if one were otherwise available.

[9] Even if such cases met the jurisdictional prerequisites of the Federal Interpleader Act—a matter discussed in the next subsection—28 U.S.C. § 1251(a) would prevent the district court from entertaining them. The specific jurisdictional statute—in this case, the one that reserves interstate controversies to this Court—controls over the general. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

several states sought to escheat the same property. *Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972). If an interstate controversy within this Court's exclusive original jurisdiction is created when two states attempt to escheat the same property, such a controversy is no less present when two states are forced to litigate their domicile claims against each other.[10]

B. Jurisdiction Cannot Be Invoked Under the Federal Interpleader Act to Resolve Death Tax Domicile Controversies Between States Because States Are Not "Citizens of a State" for Purposes of Diversity and Interpleader Jurisdiction.

Even if such interstate disputes were not within the Court's original and exclusive jurisdiction, they do not fit within the Federal Interpleader Act. Federal interpleader requires that the parties to the action include at least two "adverse claimants, of diverse citizenship as defined in [28 U.S.C.] section 1332" who are claiming money in Plaintiff's custody or possession. The identity and citizenship of the "claimants" in turn depend on the identity of the real parties in interest, since it is the citizenship of the real parties, not that of the nominal ones, which controls for diversity purposes.[11]

---

[10] Justice Stewart's concurring opinion in *California v. Texas* states that the real controversy in double domicile cases is between each taxing state and the estate, not between the states themselves. 437 U.S. at 611-12. Whatever the merits of this view before the invocation of an interpleader action, it surely cannot be the case *after* interpleader is invoked. Once that occurs, the states will necessarily be combatants vis-a-vis each other, since their claims are mutually inconsistent and both cannot prevail. Indeed, in some cases of this type (*i.e.*, where the tax rates of the two states are the same), the *only* controversy will be between the taxing states. *See* p. 11, *infra*.

Nor does the fact that the interstate controversy arises only in the "second stage" of the interpleader action (*i.e.*, when the interpleader claimants litigate their claims against one another) remove the jurisdictional bar against hearing such cases in a federal district court. The grant of exclusive jurisdiction to this Court prohibits other forums from entertaining "*all*" interstate controversies, regardless of the stage in the proceedings when they arise. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974) (motion to intervene partially denied where grant would create interstate controversy and oust the district court of jurisdiction).

[11] WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (hereafter

(footnote continued on following page)

While the Complaint in this action named as Defendants the taxing officials of California and Texas, it is readily apparent that the real parties in interest—and thus the true interpleader "claimants"—are the taxing states themselves, which will receive any taxes collected if they prevail or be restrained from collecting taxes if they do not. States, however, are not "citizens of a state" for diversity purposes (*Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894)), and neither are state taxing officials sued in their stead.[12] The District Court thus held that the Texas taxing officials named as defendants in this action were not "citizens of a state" who could support jurisdiction. App. 4d. This holding was not questioned by the Court of Appeals.

Because of these jurisdictional principles, interpleader jurisdiction can be successfully invoked in such cases only if the plaintiff can show the existence of two parties *other* than state taxing officials who are both adverse claimants to the fund at issue, and also citizens of a state. This will rarely occur, since the proper parties to such cases will normally include only the estate (represented by an executor or administrator) and the several claimant states. Thus, in the prototypical dispute of this kind—between an executor and several states—interpleader jurisdiction will be unavailable.

The Court of Appeals' finding of interpleader jurisdiction in *this* case was based on a combination of unlikely factual circumstances and incorrect conclusions of law. Out of all the

---

(footnote continued from previous page)

"Wright"), Civil § 1556, p.710 ("The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists"); 3A MOORE'S FEDERAL PRACTICE ¶17.04, pp.17-27. *Wormley v. Wormley*, 8 Wheat. (21 U.S.) 421 (1823).

[12] *See State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929) (state commission held to be "alter ego" of state and thus not a citizen for diversity purposes). As to taxing officials specifically, *see People ex rel McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942); *Craig v. S. Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942); *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir. 1936), *aff'd on other grounds*, 302 U.S. 292 (1937); *Robertson v. Ingram-Day Lumber Co.*, 271 F. 1023 (5th Cir. 1921); *Robertson v. Jordan River Lumber Co.*, 269 F. 606 (5th Cir. 1921); *Kansas City Southern R.R. Co. v. Morley*, 88 F. Supp. 300 (W.D. Ark. 1950); *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D.S.C. 1943).

parties named, it found only *two* which it regarded as "claimants" who were also "citizens" of diverse states. It first held that if a stakeholder is "interested" in the fund—that is, if it also asserts an entitlement to it—then it is also a "claimant" whose citizenship can be considered for jurisdictional purposes. App. 11a. The court concluded that Respondent Lummis, as the Texas Administrator, met these criteria. *Id.* As for the second of the two necessary diverse claimants, the court seized upon Petitioner Alvord, the County Treasurer of Los Angeles. Under the prior law of California, the death tax was paid to the county treasurer, who retained a small percentage as a commission and remitted the balance to the State. *See* note 3, *supra.* But, as we shall now show, the Court of Appeals' analysis certainly provides no basis for ever again utilizing the Federal Interpleader Act as a means of resolving controversies of this kind, and is seriously flawed even as applied to this case.

First, the Court of Appeals' finding that the Texas Administrator is an "interested" claimant rests on the fact that since the applicable tax rates of California are higher than those of Texas, the Estate has an interest in the determination of domicile for death tax purposes. But if all the states seeking to assert inheritance taxes against an estate would apply the same tax rate, the estate would be a disinterested stakeholder whose citizenship could *not* be considered in determining interpleader jurisdiction. *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939). The same would be true if all the states were among the many whose tax rates were equal to or below the amount allowed as a credit against the federal estate tax. The only claimants in such cases would be the states themselves and interpleader jurisdiction could not be established. This case was different only because the California tax rate (24%) exceeds the Texas tax of 16%.

Second, the holding of the Court of Appeals that the citizenship of an interested stakeholder can be considered for purposes of establishing interpleader jurisdiction is incorrect, and would lead to a radical and wholly unwarranted expansion of federal jurisdiction. *See* Part II, *infra.* But unless the citizenship of an interested stakeholder may be considered in meeting the jurisdictional prerequisites of the Federal Interpleader Act, that statute will not be available to resolve interstate death tax controversies.

Third, even if the stakeholder is interested and may properly be considered as a "claimant" for jurisdictional purposes, a second diverse "claimant" must be found. The Court of Appeals found such a claimant in this case due to the happenstance that, at the time the Complaint was filed, the County Treasurer of the County of Los Angeles stood to receive a tiny percentage of the Hughes Estate if Hughes were ultimately determined to have been a California domiciliary. *See* note 3, *supra*. But this feature of California law has now been repealed. *See* note 7, *supra*. Thus, if a case identical to this one arose tomorrow, interpleader jurisdiction would be unavailable. And, for reasons fully explained in Part III, *infra*, that statutory change destroyed any jurisdiction that may once have existed in the present case.

It bears emphasis that *each* of these factors was necessary to the Court of Appeals' decision and that, without *any* of them, jurisdiction would not have been established, even if the prior California law giving the County Treasurer a share of the Estate had not been repealed. If, in a future case, the estate is disinterested or neither state happens to share its tax proceeds with a local official, interpleader will not lie. Nor will interpleader be proper in any such case if the Court were to hold that the citizenship of an interested stakeholder may not be considered for purposes of determining interpleader jurisdiction. *See* Part II, *infra*. Interpleader will rarely, if ever, be an available remedy for the resolution of death tax controversies between states.

C. Interpleader Should Not Be Used to Resolve Death Tax Domicile Controversies Between States Because It Requires States to Submit Their Tax Claims to Jurors Who Will Be Citizens of a Rival Claimant State.

Interpleader is also an unsuitable means to resolve death tax controversies between states because the inevitable effect of provisions drafted without that use in mind is that such cases will be decided by jurors who are citizens of one of the claimant states. 28 U.S.C. §1397 provides that an interpleader action may be brought in any judicial district where one or more claimants reside. Ordinarily, *all* the potential claimants will

reside in one or the other of the states which claims to be the domiciliary state and no neutral forum will be available. In such cases, venue will be proper—as far as the statute is concerned—only in one of the claimant states. And the estate which invokes interpleader will be able in all cases to lay venue in the state with the lowest death tax rate, giving that state a decided advantage over the other state.

Thus in most cases, as in this, interpleader will force one of the competing states to submit its tax claim for judgment by jurors of a rival state.[13] A greater affront to federalism is difficult to imagine. Throughout our history it has been regarded as inappropriate to compel a state to resort to the tribunals of another state for redress. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (cataloguing reasons behind grant of original jurisdiction for suits between states and citizens of other states); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 288 (1888) (same); *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419, 475-76 (1793) (same); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1681 (4th ed. 1873) (reasons for exclusive jurisdiction of Supreme Court over interstate controversies). That reluctance should be greatly intensified where, as in this case, the dispute is between two states, and the tribunal sits in one of them. California should not have to litigate its dispute with Texas before a jury of Texas citizens. *See* Part IV, *infra*.

Unfortunately, a district judge persuaded that such a controversy should be heard in a neutral forum will ordinarily be unable to achieve that end. 28 U.S.C. § 1397 requires the suit to be brought where one of the claimants resides. Except in an unusual case in which other claimants, residing elsewhere, are also joined, transfer under 28 U.S.C. § 1404(a) will not be possible. That section allows transfer only to a district in which the action "might have been brought." *See Hoffman v. Blaski*,

---

[13] Jury trial is quite likely to be available as of right in this action. *Ross v. Bernhard*, 396 U.S. 531 n.15 (1970) (jury trial right may be applicable to legal issues presented in interpleader action despite equitable nature of remedy); *Lipscomb v. Lipscomb*, 265 F.2d 822 (D.C. Cir. 1959); *Shafer v. Children's Hosp. Soc'y*, 265 F.2d 107 (D.C. Cir. 1959) (jury trial required to decide issue of decedent's domicile). *Cf.* 28 U.S.C. §§ 1346(a)(1), 2402 (jury trial right available in action contesting federal taxes).

363 U.S. 335 (1960). This is yet another illustration of how poorly suited is the Interpleader Act for the task of resolving conflicting state death tax claims.

For these reasons, interpleader is the wrong remedy for adjudicating multiple domicile-based death tax claims. The proper remedy is the exercise of this Court's original jurisdiction. That jurisdiction is fully responsive to the delicate issues of interstate comity inherent in the adjudication of such disputes, since this Court is uniquely suited to provide a neutral forum for resolving interstate controversies. Moreover, the invocation of the original jurisdiction is not affected by chance events which have no bearing on the justiciability of the controversy, such as whether a state's inheritance tax is shared with a local official.[14] It is for these reasons that California has filed, together with this Petition, a Motion for Leave to File Complaint which we urge the Court to consider in tandem with this Petition. *See* note 1, *supra*. Granting the Petition so that argument on the merits would occur at the same time as argument on the motion would afford the Court an opportunity to settle once and for all the troublesome question of how these disputes should be resolved.[15]

---

[14] To be sure, the invocation of the original jurisdiction under *Texas v. Florida* depends on whether the competing states' claims plus that of the Federal Government threaten to deplete the estate's assets. But hinging this Court's jurisdiction on the likelihood of depletion of the estate is quite logical. Only if the competing tax claims exceed 100% of the estate does each state's claim pose a threat to (and thus create a controversy concerning) the tax claim of the other state. If both states can be satisfied from the estate's assets, each state may collect and enforce a judgment and there is thus no interstate controversy.

[15] Conversely, denying certiorari may well send a misleading signal to state taxing officials and executors and administrators of estates threatened with multiple taxation. Because this is the first double domicile case following *California v. Texas* and because of the publicity which proceedings involving Howard Hughes seem to generate, the denial of certiorari will doubtless be read by executors and state taxing officials, and their lawyers, as approval by this Court of the use of federal interpleader to resolve interstate death tax controversies. States may therefore fail to take actions which could pretermit such cases, *e.g.*, signing the Uniform Act on Interstate Arbitration of Death Taxes, while attorneys doing premortem counseling may refrain from advising their clients to avoid living so as to create double domicile problems out of a false sense of security that federal interpleader will be available to prevent multiple taxation. For the reasons discussed in text, however, interpleader will not be available to resolve these problems, except in the most unusual cases.

To be sure, the Court of Appeals in this case found federal interpleader jurisdiction to exist and thus at least superficially solved the problem of providing a federal forum for resolution of *this* interstate death tax controversy. For the reasons already stated, however, the unique circumstances of this case which led the Court of Appeals to find jurisdiction will not be repeated; the decision below is thus an "adjudication[ ] . . . in[ ] the same class as a restricted railroad ticket, good for this day and trip only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Moreover, as we shall now show, the price of this result was the distortion of hitherto accepted principles of federal jurisdiction, federalism, and orderly appellate procedure. *First*, the Court of Appeals held that an interested stakeholder is a "claimant" for purposes of the Federal Interpleader Act, a result which, though seemingly innocuous, poses an immediate threat of a radical and unwarranted expansion of federal jurisdiction. *See* Part II, *infra*. *Second*, the Court of Appeals improperly refused to consider the effect on its decision of a supervening change in California law which destroyed the basis for federal jurisdiction of this action, in violation of a decision of this Court. *See* Part III, *infra*. *Third*, the Court's holding that the District Court did not abuse its discretion in refusing to transfer this action to a forum whose residents would have no interest in the outcome ensures that the competing tax claims against this massive estate will occur in a forum whose residents—and thus whose jurors—may not be impartial and will certainly not appear to be so. *See* Part IV, *infra*. These considerations warrant the grant of certiorari whatever the ruling on the Motion for Leave to File Complaint.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' HOLDING THAT THE CITIZENSHIP OF A STAKEHOLDER SHOULD BE CONSIDERED IN DETERMINING WHETHER INTERPLEADER JURISDICTION EXISTS, A RULING WHICH RADICALLY EXPANDS FEDERAL JURISDICTION.

The Court of Appeals sustained interpleader jurisdiction because it found that Respondent Lummis' citizenship (Nevada) was diverse to that of the County Treasurer of Los Angeles (California), and that both Lummis and the County

Treasurer were "claimants" under the Federal Interpleader Act. App. 11a-12a. In so holding, the court explicitly held that the citizenship of an interpleader plaintiff who, in addition to being a stakeholder, also claims an interest in the fund may be considered for purposes of determining whether interpleader jurisdiction exists. *Id.* 11a. Because jurisdiction under the Federal Interpleader Act is premised upon the existence of at least two adverse claimants of diverse citizenship, the decision below necessarily means that the conflicting claims of just *one* interested plaintiff and *one* defendant to a specific fund are a sufficient basis for jurisdiction under the Act. This holding would have a radical, and plainly undesirable, effect on fundamental principles of federal jurisdiction, as several examples illustrate.

First, consider the case in which an insurance company or other institution holds a sum of money which is claimed by X, and X alone. The insurer, a citizen of State A, disputes the claim of X, a citizen of State B. Under the Court of Appeals' opinion, the insurer (which is "interested in" the funds it holds by virtue of its challenge to X's claim) would be a "claimant" of diverse citizenship to X, also a claimant, and could invoke federal jurisdiction under the Federal Interpleader Act. Why should this be permitted? These hypothetical facts describe a garden-variety dispute between two parties which could be settled in state court, or a federal court under general diversity jurisdiction if the $10,000 jurisdictional minimum is satisfied. But if interested stakeholders are "claimants," then nearly every bilateral dispute could be framed to invoke federal interpleader jurisdiction, thereby obtaining for the plaintiff nationwide service of process (28 U.S.C. § 2361) and a greatly reduced jurisdictional minimum. *Compare* 28 U.S.C. § 1332(a) *with id.* § 1335(a)($500 jurisdictional minimum).

Second, if an interested stakeholder is a "claimant" for purposes of Section 1335, it must also be a "claimant" for purposes of venue under Section 1397, which provides that statutory interpleader actions must be brought where one or more claimants reside. By alleging an interest in the fund, the stakeholder could bring the action in the place of its own residence. Thus if a Delaware insurer who altogether denies liability seeks to interplead a dozen claimants all residing in

California (or there, Washington and Oregon), it could compel them to litigate their claims in Delaware, without regard to their prior contacts with that state.

Third, as the first example demonstrates, the jurisdictional minimum of Section 1332 would be largely frustrated. Virtually *every* "rule interpleader" action, previously thought to have been based on general diversity, could be recast under the Federal Interpleader Act whenever the stakeholder is interested in the fund.[16] There is no indication that Congress intended the Act wholly to displace interpleader actions brought under the usual diversity jurisdiction of the district courts where the $10,000 jurisdictional minimum is not present and where there is no special need for a federal forum with nationwide service. Yet that would be the inevitable result of the Court of Appeals' reinterpretation of Section 1335.[17]

These serious, adverse consequences of the lower court's holding would not be accompanied by any measurable benefits. Even if the citizenship of the stakeholder administrators who would ordinarily bring an interpleader action to resolve an interstate death tax controversy could be considered for jurisdictional purposes, interpleader jurisdiction could not be successfully invoked unless the administrators also named a defendant who was simultaneously both a "claimant" and a "citizen of a state." For the reasons discussed in Part I, *supra*, the state taxing officials named as defendants will not be able to fill this jurisdictional lacuna. While the Court of Appeals in this case found that such an additional defendant existed in the person of the County Treasurer of Los Angeles, this finding was premised on California statutes, since repealed, which gave the County Treasurer a tiny percentage of the Estate if Hughes

---

[16] The prototypical rule interpleader case is one in which the plaintiff-stakeholder is in State A and defendants-claimants are co-citizens of State B. Such actions fall comfortably within Section 1332 so long as the $10,000 jurisdictional requirement is satisfied.

[17] Neither the cases cited by the Court of Appeals (*Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 488 (D. Md. 1962) and *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 477 & n.8 (E.D. La. 1960)), nor Professor Wright, upon whom the court below also relied (App. 11a), appear to have considered most of these serious disruptions to the federal jurisdictional scheme which would be caused by treating an interpleader plaintiff as a claimant for jurisdictional purposes.

were adjudged ultimately to have been a California domiciliary. But, as shown above, this "solution" to this jurisdictional problem will not be available in future disputes of this kind. *See* pp. 11-12, *supra*. Thus, even if one assumed that the greatly increased burdens on the federal judiciary created by the Court of Appeals' interpretation of the interpleader statute could be justified in the interest of sparing this Court's original jurisdiction of the necessity to resolve interstate death tax disputes by providing an alternative forum, no such benefit will in fact be attained. Certiorari should therefore be granted to prevent the radical and unwarranted expansion of federal jurisdiction which the Court of Appeals opinion would cause, if left to stand.

III.
THE WRIT SHOULD ISSUE BECAUSE THE COURT OF APPEALS' FINDING OF JURISDICTION HAS BEEN SUPERSEDED BY CHANGES IN CALIFORNIA LAW.

As noted above, the Court of Appeals found interpleader jurisdiction to exist in this case because it found the requisite minimal diversity between Respondent Lummis, the Texas Administrator, and Petitioner Alvord, the County Treasurer of the County of Los Angeles. Jurisdiction was thus found to exist in this case solely because of the unusual circumstance that, under California law at the time the Court of Appeals opinion was rendered, the *state* death tax was collected by a *county* treasurer, who retained a tiny fraction of the tax as compensation for that administrative service and was required to remit the balance to the State of California. Because the citizenship of a county officer, unlike that of a state officer, may be considered for diversity purposes, Petitioner Alvord was held to be a claimant and a citizen of California, of diverse citizenship with Respondent Lummis.

On January 1, 1981, however, California law regarding inheritance tax procedure was completely revised. On that date, AB 2092 (Chapter 634 of the California Statutes of 1980), became effective. This statute repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment to the County Treasurer

of the inheritance tax, retention by him of a "commission" and transmittal to the state of the balance) and amended Calif. Rev. & Tax. Code §14104 to require payment of the tax to the State Controller. *See* App. 19i, 36i. These statutory changes eliminated Petitioner Alvord's interest in the Hughes inheritance tax, as he is no longer entitled to receive a portion of any inheritance tax paid after January 1, 1981.[18] *Id.* 38i.

Whatever may have been the case when the Court of Appeals rendered its original decision, it is now clear that Alvord is no longer a claimant to any portion of the funds which are the subject of the interpleader action, i.e., the Hughes Estate. In the language of the Interpleader Act, Alvord is no longer a person who is "claiming or may claim to be entitled to . . . money or property" in the stakeholder's custody or possession. Because Alvord is no longer a "claimant," he is not a proper party and the action against him must be dismissed. The required presence of at least two adverse claimants of diverse citizenship does not now exist, and federal interpleader jurisdiction thereby fails. *See Kennametal, Inc. v. International Union*, 161 F.Supp. 362 (W.D. Pa. 1958)(abandonment of claim by one of two claimants terminates jurisdiction under §1335); *Dakota Livestock v. Keim*, 552 F.2d 1302, 1306 (8th Cir. 1977).

It has long been settled that where the addition or deletion of a party *after* the complaint has been filed affects the existence of diversity of citizenship, jurisdiction must be redetermined in light of that changed circumstance. This principle has been applied in a wide variety of contexts:

> (1) The joinder of additional defendants whose citizenship is the same as the plaintiff will destroy diversity jurisdiction. (Accordingly, the courts often state that such

[18] Although legislative "motive" is irrelevant to any issue before this Court, we nevertheless wish to assure the Court that the 1980 revision to California's inheritance tax law—and specifically the elimination of the county treasurer's participation in death tax collections—was entirely independent of this case and made without any consideration (or even appreciation) of the effect it would have on federal interpleader jurisdiction here. As can be seen from an examination of the legislation (which is reprinted as Appendix I) the revisions are extensive. The particular provisions concerning the role of the county treasurers had been proposed for many years. Special counsel for California played no role, direct or indirect, in the formulation of this legislation.

joinder should not be allowed or required unless such defendants are indispensable parties.)[19]

(2) Similarly, the joinder of an additional plaintiff who is a citizen of the same state as a defendant will oust the court of jurisdiction.[20]

(3) Conversely, when after the filing of the complaint the plaintiff undertakes to correct an absence of jurisdiction by dismissing non-diverse defendants, jurisdiction will be re-determined following such dismissal.[21]

(4) Where the original complaint includes two or more plaintiffs, of whom some are citizens of the same state as a defendant, the jurisdictional defect can be eliminated by dismissing the non-diverse plaintiff(s), following which jurisdiction is re-determined.[22]

(5) Intervention of an indispensable party who is a citizen of the same state as the intervenor's opposing party destroys diversity jurisdiction, as measured at the time of intervention.[23]

---

[19] *E.g., Clarkson Co., Ltd. v. Shaheen,* 544 F.2d 624, 628-29 (2d Cir. 1976); *Haas v. Jefferson Nat. Bank,* 442 F.2d 394 (5th Cir. 1971)(dismissal after District Court had ordered joined an indispensable party whose presence destroyed diversity); *Reynolds v. Wabash R.R. Co.,* 236 F.2d 387 (8th Cir. 1956); *Wallace v. Knapp-Monarch Co.,* 234 F.2d 853, 860 (8th Cir. 1956).

[20] *E.g., Adams Express Co. v. Denver & Rio Grande Ry.,* 16 F. 712 (C.C.D. Colo. 1883); *cf. Gaddis v. Junker,* 27 F.2d 156, 159 (E.D. Tex. 1928)(treating intervenors who joined with the cooperation of plaintiffs as "in the category of plaintiffs" and holding that their joinder destroyed diversity jurisdiction); *Forest Oil Co. v. Crawford,* 101 F. 849 (3d Cir. 1900)(same).

[21] *E.g., Publicker Indus., Inc. v. Roman Ceramics Corp.,* 603 F.2d 1065, 1068-69 (3d Cir. 1979); *Fetzer v. Cities Serv. Oil Co.,* 572 F.2d 1250, 1253 n.4 (8th Cir. 1978); *Ralli-Coney, Inc. v. Gates,* 528 F.2d 572, 575-76 (5th Cir. 1976); *Finn v. Am. Fire & Cas. Co.,* 207 F.2d 113 (5th Cir. 1953), *cert. denied,* 347 U.S. 912 (1954). In *Finn,* this Court had determined on a prior appeal after a trial that the District Court lacked diversity jurisdiction; on remand, the District Court dismissed the non-diverse defendant and reinstated the judgment. The Court of Appeals held that by doing so, the District Court cured the lack of jurisdiction.

[22] *E.g., Alderman v. Elgin, J. & E. Ry. Co.,* 125 F.2d 971 (7th Cir. 1942); *Drumright v. Texas Sugarland Co.,* 16 F.2d 657 (5th Cir.), *cert. denied,* 274 U.S. 749 (1927); *Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co.,* 204 F. Supp. 83 (D. Conn. 1962).

[23] *Chance v. County Bd. of School Trustees,* 332 F.2d 971 (7th Cir. 1964); *Kentucky Natural Gas Corp. v. Duggins,* 165 F.2d 1011, 1015 (6th Cir. 1948); *Kendrick v. Kendrick,* 16 F.2d 744, 745 (5th Cir. 1926), *cert. denied,* 273 U.S. 758 (1927); *Fryer v. Weakley,* 261 F. 509 (8th Cir. 1919).

(6) Permissive intervention of a non-indispensable party who is a citizen of the opposing party's state also destroys jurisdiction.[24]

In short, the presence or absence of diversity jurisdiction is re-determined *after* there has been an addition or elimination of a party.[25] The Court of Appeals was therefore required, at least, to consider the effect on its jurisdiction of the changes in California statutory law which effectively removed Petitioner Alvord's interest in the litigation.

It did not do so. The California statute revising the state's inheritance tax procedures had not been enacted at the time of

---

[24] *E.g., Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 197 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952)(allowing State of Texas to intervene was error because it was not a "citizen of a state" and, if uncorrected, its "presence would destroy the jurisdiction of the court"); *Johnson v. Riverland Levee Dist.*, 117 F.2d 711, 715 (8th Cir. 1941)(intervention with consent of plaintiff by a party residing in same state as defendant "destroys the jurisdiction of the court"); *Forest Oil Co. v. Crawford*, 101 F. 849 (3d Cir. 1900).

A different rule exists where the suit is a class action and the intervenor is a member of the class or where the controversy between the intervenor and the opposing parties is "ancillary" to the main action (as when the intervention is "as of right" under F.R. Civ. P. 24(a)). Neither of these rules is applicable here, either directly or by analogy. This is not a class action, and there is no "ancillary" dispute, the only issue before the Court being that of the domicile of Hughes for inheritance tax purposes.

[25] A different rule applies when there is a *pro forma* substitution of one party for another, as where a party dies and his or her executor is substituted in. But even this rule does not govern where the substitution changes the nature of the action or the nature of the right asserted therein, in which event jurisdiction is re-determined as of the time of substitution. *Grady v. Irvine*, 254 F.2d 224 (4th Cir. 1958), *cert. denied*, 358 U.S. 819 (1958); *see also Rippey v. Denver U.S. Nat'l Bank*, 42 F.R.D. 316 (D. Colo. 1967).

Professor Wright's Treatise states that "a change of parties, by addition, substitution, or elimination . . . will not divest the court of jurisdiction if the nature of the action remains the same . . . ." Wright, *supra*, § 3608, pp. 656-57. A careful reading of this section suggests that Professor Wright is referring here to the rules applicable to (1) *pro forma* substitution, as discussed in the preceding paragraph (*see* 13 Wright, *supra*, at 659-60; and (2) the addition of parties as a consequence of the *defendant's* action, as by impleader, compulsory counter-claim or cross-claim, which is treated as within the *ancillary* jurisdiction of the court. *See id.* at 657. Professor Wright does not suggest that the rules outlined in text are any different than those stated here.

briefing or oral argument in the Court of Appeals and did not become effective until the court's decision had been rendered and the time for rehearing had run. The revisions were promptly brought to the attention of the court by means of a petition for rehearing coupled with a motion for leave to file that petition out of time. The motion, however, was summarily denied. App. "C". That summary denial "so far depart[s] from the accepted and usual course of judicial decisions" and from the teaching of this Court, so as "to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a).

The principle which should have guided the Court of Appeals—in addition to the cases just cited—was enunciated in *Huddelston v. Dwyer*, 322 U.S. 232 (1944). In that case, after the Court of Appeals had issued its initial decision and denied a timely petition for rehearing, the state supreme court overruled the state law upon which the court of appeals decision had relied. As in this case, Petitioners moved to file a second petition for rehearing based on the intervening decision, which the Court of Appeals denied. This Court granted certiorari and vacated the Court of Appeals' decision, holding that the change in state law "at least raised such doubt as to the applicable . . . law as to require its reexamination, . . .". *Id.* at 236-37. The summary refusal by the Court of Appeals to consider the effect of the change in California law brought about by AB 2092 was thus in violation of this Court's teaching in *Huddleston*.

The Court of Appeals' refusal to consider the recent change in California law and its upholding of jurisdiction on the ground that Alvord was a "claimant" when the complaint was filed, is not only contrary to *Huddleston* and the cases summarized above, but has also lead to a bizarre result: jurisdiction has been sustained because of the happenstance that, under the law as it stood on the date the complaint was filed, Alvord held a tiny fraction of the California tax claim even though (1) the law has subsequently changed, and Alvord no longer holds any such claim or has the slightest interest in this case; (2) there is now only *one* proper party—the Texas Administrator—who could conceivably qualify as both a "claimant" and a "citizen" of a state under the Interpleader Act (and his citizenship may only be considered at the cost of

radically expanding federal jurisdiction); (3) if an identical case arose tomorrow, it could not be brought in the district court under the Interpleader Act; and (4) all of this became clear before any final determination of the issue of jurisdiction in a case which has not yet passed beyond the pleading stage. The present posture of this case thus highlights the jurisdictional barriers to the use of the Interpleader Act as a means of resolving multi-state domicile-based death tax disputes.

IV.

THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION REQUIRING CALIFORNIA, A SOVEREIGN STATE, TO SUBMIT ITS TAX CLAIM TO A JURY COMPOSED OF CITIZENS OF TEXAS, A RIVAL STATE.

If, despite the arguments previously advanced, this case is to be heard in a federal district court pursuant to the Federal Interpleader Act, the procedures used must be responsive to the unique characteristics of this dispute. In particular, the trial of this case should occur in a forum whose citizens—and thus whose veniremen—have no stake in the outcome of the controversy and no emotional attachment to the interest of any party. Such a "neutral forum" is available in this case: The District of Colorado.[26]

---

[26] The ability of this Court to order the action transferred to Colorado is dependent on the joinder as defendants of the twenty-two heirs whom the Administrators themselves have recognized as having legitimate claims. Under 28 U.S.C. § 1404(a), an action may only be transferred to a district where it might have been brought. If the heirs were added, however, the judicial districts in which they reside—which include the District of Colorado—would become permissible transferee forums since the action as it would then stand could have been brought in those districts in the first instance.

The heirs must be joined, in any event, in order to protect California against relitigation of the domicile issue in the California state courts. Even if California prevailed in the interpleader action, California law makes heirs indispensable parties to inheritance tax proceedings (*Allen v. Flournoy*, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972)), and the California courts might well conclude that the heirs were not bound by the federal adjudication since they were not parties thereto. Indeed, even if one accepted the view of the Court of Appeals that the heirs need not be joined because they are in privity with the Administrators who are parties, Rule 19(a)(2)(i) requires

(footnote continued on following page)

28 U.S.C. §1404(a) allows the transfer of a civil action to any court in which the action "might have been brought" in "the interest of justice." The interest of justice requires that this action be heard in a forum which no party contends was the domicile of Howard Hughes.

The present action is based upon the conflicting tax claims of two states; it is a controversy between Texas and California over the domicile of Howard Hughes. Even if this case is held not to be an interstate controversy within the Court's exclusive original jurisdiction, the delicate nature of the adjudication the Estate seeks is indisputable. Proceedings in the courts of California and Texas have been enjoined. The collection of taxes has been restrained. And two sovereign states are being asked to adjudicate their conflicting tax claims in a single proceeding in a federal trial court.

This ineluctable entrenchment on state sovereignty is surely heightened by the fact that, unless overturned, the Court of Appeals' decision will force one state to litigate its claim against another before a jury composed of citizens of the latter state. As we have already shown (at page 13, *supra*), this result is incompatible with the concern for state sovereignty and the respect for each state's dignity which underscores the grant of original and exclusive jurisdiction to this Court to resolve controversies between states.

Acceptance of this argument would require transfer to a neutral forum (if one were available under 28 U.S.C. §1397) in every interstate interpleader brought to resolve multistate death tax claims. But there are several additional factors specific to this case which, taken together, show that even if a neutral

---

(footnote continued from previous page)

joinder of persons who are in privity with those already parties because their interests will be affected by the outcome of the dispute. *Bry-Man's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963).

While we do not argue that the joinder issue, standing alone, is of sufficient importance to be a separate ground for issuance of the writ, should the Court grant certiorari, the heirs should be joined to permit transfer of the action to a neutral forum and to insure that interpleader jurisdiction, if upheld, will achieve its intended purpose of precluding multiple litigation of the domicile issue. Because changing venue is dependent on joinder of the heirs, the latter question is "fairly included" (Sup. Ct. R. 21.1(a)) within the former and we therefore intend to brief and argue the joinder issue if certiorari is granted.

forum is not required in all such cases, the Court of Appeals abused its discretion and impermissibly violated Petitioners' constitutional rights when it refused to order a transfer.

(a) *Pecuniary Interest of Finders of Fact.* The ultimate fact-finders in this litigation, if citizens and taxpayers of Texas (or, for that matter, California) will have a direct pecuniary interest in the outcome. The California inheritance tax referee has found the value of the Estate to be approximately $1.1 billion. If this value is accurate, the Texas death taxes would be approximately $158 million. Because there are approximately 12.8 million residents of Texas according to the most recent projections, each resident of Texas would stand to gain an average of $12.34 if there were a finding of Texas domicile. Moreover, because the funds generated by the Texas inheritance tax are maintained in the State's "General Revenue Fund" which is "the major state operating fund from which most agencies are financed" (*State of Texas 1977 Annual Financial Report* 18-19 (R.I., 99 and Exhibit E)), there is no doubt that the taxes Texas seeks here will inure to the benefit of its citizens, either through increased public services or a tax reduction. The magnitude of this potential tax recovery is underscored by the fact that it alone would represent approximately 7.9% of the $2.2 billion total tax revenues contributed to the state's general revenue fund in fiscal 1977. Indeed, the *total* inheritance tax receipts for the State of Texas for the fiscal year ending August 31, 1977 amounted to only $66.6 million, far less than the tax at issue here.[27]

---

[27] Moreover, in the ordinary tax case, there are only two sides: the state and the taxpayer. Jurors are both citizens and taxpayers. While they have an interest in maximizing their state's revenue (and the courts have recognized that appeals to the pecuniary interests of juries in tax cases are improper, *see, e.g., Epperson v. United States,* 490 F.2d 98 (7th Cir. 1973)), jurors may also have sympathy as taxpayers for the individual or corporation against whom the tax is being asserted. Hence jurors bring to the ordinary tax case no preconceptions which might tip the scales of justice. But because this case is at bottom an *interstate* controversy, there are three relevant parties, not two: Texas, California and the Estate. A Texas juror might, as a Texan, be sympathetic with the State of Texas and, as a taxpayer, have a countervailing identification with the Estate. But he would be unlikely to feel empathy for California's tax claim.

The jurors' personal stake in the controversy makes a trial by jury in Texas federal court inconsistent with the disinterested trier of fact required by the Due Process Clause. *Tumey v. Ohio*, 273 U.S. 510 (1927) (village mayor who received $12 in costs if defendant convicted has disqualifying self-interest); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (invalidating conviction by mayor's court whereby mayor, in addition to judicial functions, possessed executive responsibility for village finances which were affected by fines levied in his court); *Connally v. Georgia*, 429 U.S. 245 (1977) ($5 fee for issuing search warrant disqualifies magistrate).[28]

(c) *Effects of Regional Pride.* Trial of this action in Texas also runs the risk that the parochial effects of local and regional pride could have an effect upon the jury. Howard Hughes was a distinguished American who pioneered in aviation, film production and business and—financial benefits aside—any

[28] Of course, where the only fact-finders available to resolve a dispute all have a direct or indirect interest in the outcome, the "rule of necessity" applies and the case will be decided by the available judges or jurors. *United States v. Will*,—U.S.—, 49 U.S.L.W. 4045 (December 15, 1980). But here a forum in which disinterested citizens reside can be provided through a Section 1404(a) transfer. *See* note 26, *supra*. The rule of necessity is therefore inapplicable.

The line of cases cited in text is underscored by the Court's recent decision in *Marshall v. Jerrico, Inc.*—U.S.—, 48 U.S.L.W. 4485 (April 28, 1980). There the Court confronted an attack on the enforcement of the Fair Labor Standards Act by the Employment Standards Administration (ESA) of the Department of Labor, based on the fact that the ESA received civil penalties assessed under the Act as reimbursement for the costs of determining violations and assessing penalties. Noting that the "requirement of neutrality has been jealously guarded" (*id.* at 4486), the Court nonetheless rejected the due process challenge, holding that "the strict standards of *Tumey* and *Ward*" were not applicable to the ESA, which acted as a prosecutor rather than a judge in Fair Labor Standards cases. *Id.* at 4487. (The actual determination of such cases was performed by the Office of Administrative Law Judges, which received no funds whatever under the statutory scheme.) But the clear intimation of the opinion is that if *Tumey* and *Ward* had been applicable, the fact that the decision maker's agency would financially benefit from a favorable decision would have violated the due process clause. It follows that the same prohibition would prevent a juror from adjudicating a case the result of which would be to cause a substantial benefit to accrue to the juror's home state unless, of course, no alternative forum were available.

state would be proud to claim him as its own. The determination of domicile in a death tax case inevitably involves conflicting interpretations as to the decedent's mental intent, that is, where the decedent felt his "home" was. If this case were tried in Texas, this subjective determination inherently would be open to the risk that jurors would—despite instructions to the contrary—use their personal feelings about their home state of Texas as a guide to divining the feelings of the decedent. Moreover, the pride and affection which each Texas juror justifiably has for the State of Texas would make the jury uncommonly receptive to evidence, such as Mr. Hughes' past statements about Texas,[29] which jurors drawn from other states could view dispassionately.

---

[29] For example, counsel for Texas made the following statement in his closing argument to the jury in the previous state court trial:

> "I think this is as good a time as any to explain that our chief witness in this case has been Howard Hughes, and we have tried to bring you what Mr. Hughes said, and I think that you all realize that there are times in a man's life or person's life . . . where you say things with more seriousness than you do at other times, and I believe we can point out to you that when there was a really serious event, that Mr. Hughes became a Texan and was a Texan and said he was a Texan for the world to hear.
>
> "And the first such event that I will speak to, now, is this 1938 reception. He is back *here*, at his boyhood home. He is at the Rice Hotel, and I read to you from the paper what he said, . . . the paper said, 'Bashful as a schoolboy and just as captivating, Mr. Hughes dug down in his pocket and brought out a wad of notes from which he spoke. 'If you don't believe I wrote this, myself, just try to read the handwriting,' he said. 'Coming from Texas, particularly if it's a person flying around the world,' Mr. Hughes said, 'there is nothing you can see anywhere that you can't see in Texas. After you have flown across Texas, two or three times the distance around the world doesn't seem so great. We didn't see any mountains on our trip that were any steeper than the mountains in West Texas. We didn't see any plains that were any broader than the plains of Central Texas, and we didn't see any swamps that were any wetter than the swamps of Southeast Texas.'
>
> "Now that is what Mr. Hughes said about his state, and he said it *here* and he said it to people who were *here* welcoming him home; and I want you to pay close attention as we bring you, today, a recap of all the statements that Mr. Hughes ever made about Texas, because you are going to be asked to believe by the Administrators that he declared himself an ex-Texan, that he didn't like Texas, that he left it in 1925 and

(footnote continued on following page)

(d) *Publicity Concerning Prior State Verdict.* The danger that the decision in this action might be influenced by considerations of local or regional pride if tried in Texas is exacerbated by the substantial prior publicity accorded to a prior state court domicile trial between Texas and the Estate. As with everything Howard Hughes touched, the Hughes probate proceedings have engendered an enormous amount of publicity, much of it generated by the prior domicile trial in the Texas state courts. The record reveals that the Austin press has devoted extensive coverage to the tangle of legal proceedings which have developed since Howard Hughes' death, with, of course, particular emphasis on the domicile trial. *See* R.I., 105 and attached Exhibits. Should this action be tried to a jury in Austin, it will doubtless be exceedingly difficult, if not impossible, to find jurors who have not heard about—and been influenced by—the prior state court proceedings relating to Howard Hughes. While in the ordinary retrial of a case, the members of the jury pool will be unaware that a prior verdict was rendered, litigating this action in Texas minimizes the chance that jurors will be found who are unaware of and uninfluenced by the prior adjudication.[30]

(footnote continued from previous page)

never thought about it again. *And I want you to listen closely and think about all the statements that Mr. Hughes made about Texas, and I want you to think as to whether or not you could refer to your state in the way that he referred to Texas in 1938, here in Houston, if it didn't mean something just a little special to him.* And you are going to be asked to believe that this Texas domicile is a fixation that exists only *here in Texas.*" (Reporter's Transcript, February 15, 1978, at 22-24 (emphasis added)).

We do not suggest that any aspect of this argument was improper. But it is self-evident that references to the jurors' *own* feelings about their home-state of Texas are inherently likely to have a special impact upon a Texas jury.

[30] Of course, coverage of the Texas state court proceedings was not confined to the Texas press. But the record reveals that it was far more extensive. For example, the Austin paper had five times the number of such stories than the Denver *Rocky Mountain News.* *See* R. II, 244 and Exhibits B-1 and D-1.

But more fundamentally, the impact that any given quantum of coverage has on the average reader, or potential juror, surely depends to a large extent on the individual's own interest in the subject and, hence, on his or her residence. It cannot be doubted that press coverage of the prior verdict by a *Texas* jury finding a *Texas* domicile for Mr. Hughes has a greater impact in Austin than in Denver.

(e) *Appearance of Impartial Justice.* Finally, transferring this action to a forum without a domicile claim of its own would serve not only the actuality of justice, but also the appearance of it. A federal interpleader trial will surely generate as much or more publicity as the prior Hughes probate litigation. Should this action be tried in Austin and a finding of Texas domicile result, the suspicion will inevitably be created—despite most diligent efforts of the district court to assure a fair trial—that the verdict was the result of the economic, emotional and personal considerations discussed above, rather than a product of careful deliberation on the evidence presented. Certainly the citizens of California would not perceive that justice had been done. Because the "stringent" rule against decision makers who may not *appear* impartial "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties" (*In re Murchison*, 349 U.S. 133, 136 (1955)), this factor would furnish an independent and sufficient ground for compelling transfer even if the other factors mentioned above did not exist.

Thus, each potential juror—no matter how well intentioned and how carefully instructed by the District Court—would face a host of obstacles in attempting to arrive at an impartial verdict. He would know, because of the enormous size of the Estate, that finding Texas domicile could result in a personal tax saving or a substantial and costless increase in public services. As a Texan, he might be drawn by his own feelings about Texas in ways which would benefit one side of the case to the detriment of the other. He would be aware that a previous Texas jury had found Hughes to be a Texas domiciliary. While each of these factors might be influential in its own right, together they unconstitutionally jeopardize the possibility of a fair trial.

For these reasons, the motion to change venue should have been granted, and the Court of Appeals therefore erred in holding that the district court did not abuse its discretion in denying California's motion. If, despite the arguments presented earlier, controversies of this kind *are* to be heard in federal district courts, it is of vital importance that this Court give

guidance on the question of venue so that a fair trial will be afforded to both of the claimant states.

CONCLUSION

The petition for certiorari should be Granted.

DATED: March 12, 1980.

Respectfully submitted,

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, CA 90012

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8422
Attorneys for Petitioners

**Counsel of Record*

80-1556

Office-Supreme Court, U.S.
FILED
MAR 12 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax
Attorney
Division of Inheritance
& Gift Tax
107 South Broadway
Los Angeles, CA 90012

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE,
NEMEROVSKI, CANADY &
POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK THOMAS,
WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8442
Attorneys for Petitioners

**Counsel of Record*

Appendix A

No. 79-2898.

United States Court of Appeals

FIFTH CIRCUIT.

OCT. 27, 1980.

WILLIAM RICE LUMMIS,
Texas Temporary Administrator
of the Estate of
Howard R. Hughes, Jr., Deceased,
Plaintiff-Appellant
Cross Appellee,

v.

MARK WHITE, BOB BULLOCK,
KENNETH CORY, H. B. ALVORD, et al.,
Defendants-Appellees.

KENNETH CORY, H. B. ALVORD,
Defendants-Appellees
Cross Appellants.

Appeals from the United States District Court for the Western District of Texas.

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS, District Judge*.

VANCE, Circuit Judge:

* District Judge of the Southern District of Alabama, sitting by designation.

Howard Robard Hughes, Jr. died on April 5, 1976, leaving an estate that state taxing authorities estimate at $1.1 billion and the administrators estimate at $167 million.[1] Hughes' assets primarily consisted of the stock of Summa Corporation, a wholly-owned Delaware corporation. Administrators were appointed in each of the five states where the estate's property is located: Texas, California, Nevada, Delaware, and Louisiana.[2] The claimants include twenty-one heirs who have entered a settlement agreement, about 386 other alleged heirs who have appeared in various state administration proceedings, twelve law firms, two states, an alleged wife, and a medical institution. Numerous purported wills have been offered for probate.

Both Texas and California claim Hughes as a domiciliary and assert their rights to levy state death taxes on his estate.[3] The administrators, however, allege that Hughes was domiciled in Nevada, and it is not surprising that Nevada has no state inheritance taxes. If both Texas and California levy death taxes, the total of those taxes and the federal estate tax might

---

* District Judge of the Southern District of Alabama, sitting by designation.

[1] The Internal Revenue Service estimated that the estate was worth approximately $465,000,000. The California inheritance tax referee valued the estate at $1,106,345.516. The administrators, by contract, asserted that its value was $166,800.000.

[2] The Texas court appointed William Rice Lummis and Annette Gano Lummis, Hughes' aunt and Lummis' mother, as temporary co-administrators. Annette Gano Lummis died and her powers vested in Lummis. In Delaware and Louisiana, Lummis was appointed administrator. Richard Gano was appointed administrator in California. The First National Bank of Nevada was originally appointed administrator in Nevada, but Lummis was subsequently named co-administrator.

[3] Each state seeks to tax the estate's tangible assets located within its borders and all of its intangible property.

> Tangible personal property and realty are constitutionally subject to taxation only at the place of situs. See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 [26 S.Ct. 36, 50 L.Ed. 150]; *City Bank Farmers Trust Co. v. Schnader*, 293 U.S. 112 [55 S.Ct. 29, 79 L.Ed.228] . . . [I]ntangible personal property may, at least theoretically, be taxed only at the place of the owner's domicile. *First Nat. Bank v. Maine*, 284 U.S. 312 [52 S.Ct. 174, 76 L.Ed. 313]

California v. Texas, 437 U.S. at 602 n.1, 98 S.Ct. at 3108 n.1 (Stewart, J., concurring).

equal over 100 percent of Hughes' estate.[4] Because of this impossibility the administrators seek a binding determination of Hughes' domicile.

After an eleven-week trial, a jury in a Texas probate court rejected the "Mormon will," which had been offered for probate, and determined that Hughes was domiciled in Texas at the time of his death. Three days before the Texas trial began, California, seeking a determination that Hughes was not domiciled in Texas, petitioned the United States Supreme Court for leave to file a complaint against Texas under the Court's original jurisdiction. *See* U.S. Const. Art. III § 2, cl. 2; *Texas v. Florida*, 306 U.S. 398, 59 S.Ct. 563, 83 L.Ed. 817 (1939)(involving Hetty Green's fortune). In *California v. Texas*, 437 U.S. 601, 98 S.Ct. 3107, 57 L.Ed2d 464 (1978), however, the Court unanimously denied California's motion. In concurring opinions, four members of the Court suggested that the administrators might obtain a domicile determination binding on both Texas and California under the federal interpleader statute, 28 U.S.C. § 1335, because *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), had undermined the rationale of *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 (1937).

William Rice Lummis, the Texas temporary administrator, then filed this interpleader action under 28 U.S.C. §§ 1335 and 1397 in district court and named state and local taxing officials of California, state taxing officials of Texas, the California special administrator of the Hughes estate, and the Nevada administrators of the estate as defendants. The court realigned the defendant administrators with the plaintiff administrators because it found that they were working in unison toward a

[4] Lummis asserts that assuming Texas and the Internal Revenue Service will use the Internal Revenue Service valuation of the estate and that California will use its own valuation, *see* note 1 *supra*, the estate will be liable for $763,400,000 in estate taxes. This assertion is based on the supposition that the Internal Revenue Service will assess estate taxes at the applicable marginal rate of 77 percent minus 16 percent state death tax credit, that Texas will assess at the applicable rate of 16 percent, and that California will assess at its applicable rate of 24 percent.

common goal. *See City of Dawson v. Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178, 180-81, 25 S.Ct. 420, 421, 49 L.Ed. 713 (1905). It then dismissed the action because it found that the diversity requirement of section 1335 was not satisfied. Lummis now appeals the dismissal by the district court.

The Texas taxing officials assert that *Worcester County Trust Co.* bars Lummis' suit and that the parties to the suit do not fulfill the section 1335 diversity requirement. The California officials contend that the district court has jurisdiction to grant relief under section 1335 only if the asserted heirs are joined as parties-plaintiff and their citizenship is considered for purposes of diversity.[5] Although we find that the asserted heirs need not be joined, we conclude that the district court erred in denying Lummis the remedy of interpleader.

I

Interpleader enables a person holding a fund to compel persons asserting conflicting claims to that fund to adjudicate their rights to the fund in a single action. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 534, 87 S.Ct. 1199, 1205, 18 L.Ed.2d 270 (1967); *Texas v. Florida*, 306 U.S. at 405-06, 59 S.Ct. at 567; F. James, *Civil Procedure* § 10.21 (1965); 3A *Moore's Federal Practice* ¶ 22.02[1], at 22-4 (2d ed. 1979). The remedy developed in equity and is governed by equitable principles. *Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 583 (5th Cir. 1968); *see Texas v. Florida*, 306 U.S. at 406-07, 59 S.Ct. at 567-568.[6]

---

[5] The California taxing officials also argue that the district court erred in denying its motion to transfer venue to the District of Colorado under 28, U.S.C. § 1404(a). We find, however, that the court did not abuse its discretion in denying the transfer of venue motion. *See Marbury—Pattillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974); *see generally Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947).

[6] Because the modern statutory remedy of section 1335 is equitable in origin and remedial in nature, courts must construe it liberally "so as not to result in injustice." *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739, 746 (5th Cir. 1955); *Aetna Cas. & Sur. Co v. Ahrens*, 414 F.Supp. 1235, 1254 (S.D. Tex. 1975).

The common law history of this remedy begins with detinue actions and continues with the equitable strict bill of interpleader. Under the traditional strict bill of interpleader, the stakeholder did not assert an interest in the fund or contest the extend of the liability. Hazard & Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 Calif.L.Rev. 706, 735-49 (1964); 3A *Moore's Federal Practice, supra* ¶ 22.03; 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1701 (1972); *see* 4 J. Pomeroy, *Equity Jurisprudence* § 1322 (5th ed. S. Symons 1941). The stakeholder simply brought the money or property into court and was discharged, leaving the rival claimants to litigate their entitlement to the fund. *See Texas v. Florida*, 306 U.S. at 406, 59 S.Ct. at 567; 3A *Moore's Federal Practice, supra* ¶ 22.02[1]. Because the strict bill of interpleader did not afford relief to all stakeholders, courts gradually developed the bill in the nature of interpleader. *Texas v. Florida*, 306 U.S. at 406, 59 S.Ct. at 567; Chafee, *Modernizing Interpleader*, 30 Yale L.J. 814, 839 (1921); Hazard & Moskovitz, *supra* at 745-47. Through a bill in the nature of interpleader, a stakeholder that asserted an interest in the fund or denied liability to one or more of the claimants called "upon the court to exercise its jurisdiction to guard against the risks of loss from the prosecution in independent suits of rival claims." *Texas v. Florida*, 306 U.S. at 406-07, 59 S.Ct. at 568. *Accord*, Hazard & Moskovitz, *supra* at 745, 747; *see generally* D. Louisell & G. Hazard, *Pleading and Procedure* 760-64 (3d ed. 1973); A. Scott & R. Kent, *Civil Procedure* 917-18 (2d rev. ed. 1967). Both remedies, strict bills of interpleader and bills in the nature of interpleader, were embodied in the Federal Interpleader Act of 1936, 28 U.S.C. § 1335,[7] and in the form of

[7] Other parts of this Act were codified at 28 U.S.C. §§ 1397, 2361. Section 1335 provides,

> (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or Property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(Footnote continued on following page)

interpleader provided in 1938 by Rule 22(1) of the Federal Rules of Civil Procedure. *Haynes v. Felder*, 239 F.2d 868, 871 (5th Cir. 1957); 3A *Moore's Federal Practice, supra* ¶ 22.07, at 22-47; 7 C. Wright & A. Miller, *supra* § 1701, at 357, 360.[8]

Presently there are two types of interpleader in federal courts: statutory interpleader under section 1335 and traditional equitable interpleader governed by Rule 22. *See generally* F. James, *supra* at 513-14; C. Wright, *The Law of Federal Courts* 362-63, 365-66 (3d ed. 1976). The salient difference is that section 1335 interpleader enjoys more liberal procedural rules: the statute reduces the jurisdictional amount to $500, requires only minimal diversity among the claimants, authorizes venue in any district where any claimant resides, and affords nationwide service of process. 28 U.S.C. §§ 1335, 1397, 2361. By contrast, Rule 22 interpleader falls under the usual rules for civil actions: a jurisdictional amount of $10,000, complete diversity between the stakeholder and the claimants (unless there is a federal question), venue where all plaintiffs or all defendants reside or where the claim arose, and statewide service of process. *id.* §§ 1332(a)(1), 1391(a); Fed.R.Civ.P. 4. *See generally* M. Green, *Basic Civil Procedure* 92-93 (2d ed. 1979).

(Footnote continued from previous page)

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by Virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

[8] *See* Chafee, *The Federal Interpleader Act of 1936: I*, 45 Yale L.J. 963, 970-71 (1936); S.Rep. No. 558, 74th Cong., 1st Sess. 1, 4-5 (1935).

Lummis' action, brought under section 1335, is a bill in the nature of interpleader to determine Hughes' domicile at the time of his death. *California v. Texas*, 437 U.S. at 610-11, 98 S.Ct. at 3113 (Stewart, J., concurring); *cf. Texas v. Florida*, 306 U.S. at 401, 59 S.Ct. at 565. As administrator of Hughes' estate, Lummis disputes the extent of the estate's liability to the taxing authorities of Texas and California, asserting that Hughes was domiciled in Nevada when he died. Through the equitable remedy of statutory interpleader, Lummis and the other administrators joined with him as plaintiffs seek "to require litigation of the inconsistent tax claims in a single forum in order to avert the risk of loss to the *estate* that would result from separate adjudications." *California v. Texas*, 437 U.S. at 611, 98 S.Ct. at 3113 (Stewart, J., concurring) (emphasis in original).

II

In *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 (1937), as in this case, the executor of an estate threatened with the assessment and collection of death taxes by two states brought a section 1335 action for a determination of the decedent's domicile. The Supreme Court, however, found that the suit was actually a suit against the state, and thus that it was barred by the eleventh amendment.[9] *Id.* at 300, 58 S.Ct. at 188.

In his concurring opinion in *California v. Texas*, Justice Stewart, joined by Justice Powell and Justice Stevens, observed that "this holding has been substantially undercut by subsequent developments." 437 U.S. at 608 n.10, 98 S.Ct. at 3112 n.10. Justice Powell, concurring separately in the same case, emphasized that

> in light of *Edelman v. Jordan*, 415 U.S. 651, [94 S.Ct. 1347, 39 L.Ed.2d 662] (1974), this Court's decision in *Worcester County Trust Co. v. Riley*, 302 U.S. 292, [58

[9] The eleventh amendment limits judicial power as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

> S.Ct. 185, 82 L.Ed. 268] (1937), no longer can be regarded as a bar against the use of federal interpleader by estates threatened with double death taxation because of possible inconsistent adjudications of domicile.

Id. at 615, 98 S.Ct. at 3116. Justice Brennan, also concurring, quoted Justice Powell's statement with approval. *Id.* at 601, 98 S.Ct. at 3108. In the absence of any opposing view, this court should not ignore the guidance provided by four members of the Supreme Court.

Worcester County Trust Co. was based on the view that the eleventh amendment barred all suits in which plaintiffs sought to restrain or to compel the action of state officials performing official duties imposed by constitutional state laws. 302 U.S. at 296-300, 58 S.Ct. at 186-188. Thirty-seven years later, the Court in *Edelman* clarified

> that the Eleventh Amendment bars only suits "by private parties seeking to impose a liability which must be paid from public funds in the state treasury," [*Edelman v. Jordan,*] 415 U.S., at 663 [94 S.Ct., at 1356] and not actions which may have "fiscal consequences to state treasuries . . . [that are] the necessary result of compliance with decrees which by their terms [are] prospective in nature," *id.*, at 667-668 [94 S.Ct., at 1357-1358] at least in a case such as this, where the very controversy is a result of our federal system. An interpleader action to prevent competing States' taxing officials from levying death taxes on the basis of possible inconsistent adjudications of domicile unquestionably would fall into the latter category.

California v. Texas, 437 U.S. at 616, 98 S.Ct. at 3116 (Powell, J., concurring). Because Lummis requests only prospective, equitable relief the eleventh amendment does not preclude his suit. *See generally Milliken v. Bradley*, 433 U.S. 267, 289-90, 97 S.Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977); *Gay Student Services v. Texas A & M University*, 612 F.2d 160, 164-65 (5th Cir. 1980).[10]

---

[10] Although the district court acknowledged that "the Eleventh Amendment bar may have been removed by *Edelman*," nevertheless it found that "the *Worcester* court's finding that the acts of the state taxing officials were not unconstitutional" precluded Lummis' suit.

III

The federal interpleader statute was enacted under the authority of the Constitution in article III, section 2, clause 1, which grants federal courts original jurisdiction over civil cases that arise between citizens of different states. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 71-72, 60 S.Ct. 44, 47, 84 L.Ed. 85 (1939). To enable a federal court to have jurisdiction over an action, therefore, section 1335 requires that "Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to [the] money or property." 28 U.S.C. § 1335(a)(1). In *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270, (1967), the Supreme Court interpreted this provision "to require only 'minimal diversity,' that is, diversity of citizenship between two or more claimants." *Id.* at 530, 87 S.Ct. at 1203. *Accord, Haynes v. Felder*, 239 F.2d at 871; *see* J. Cound, J. Friedenthal & A. Miller, *Civil Procedure* 627-28 (2d ed. 1974).

The district court found that the parties in this case lack minimal diversity and dismissed the action for want of jurisdiction. It concedes that Alvord, the acting county treasurer for Los Angeles County, was a citizen of California for diversity purposes, citing *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), *overruled on other grounds, Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The district court, however, summarily concluded that the administrators "are certainly not claimants for the purpose of this statutory interpleader action." It then reasoned that the state of Texas rather than the named state taxing officials was the real party in interest in the action, *see Craig v. Southern Natural Gas Co.*, 125 F.2d 66, 67 (5th Cir. 1942), and that a state is not a citizen of itself for diversity purposes, *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487, 15 S.Ct. 192, 194, 39 L.Ed. 231 (1894). Because the United States is also not a state citizen for purposes of diversity, *Kent v. Northern California Regional Office*, 497 F.2d 1325, 1327 (9th Cir. 1974); 3A *Moore's Federal Practice, supra* ¶ 22.09[3], at 22-77, under the district court's analysis, absolutely no diversity exists among the parties. This conclusion

provides little consolation to Lummis and the other administrators who are charged in their letters of administration with preserving and protecting the estate's assets, but are confronted with the complete depletion of the estate that may result from the collection of domicile-based death taxes by two different states. The incongruity of such a result is manifest in a case in which scores of interested persons spread over the entire western United States and at least three different sets of government taxing authorities are vying over an enormous sum of money.

The controversy in this case is "between each State and the decedent's estate as to the legal obligation to pay death taxes." *California v. Texas*, 437 U.S. at 611, 98 S.Ct. at 3113 (Stewart, J., concurring). The action is a bill in the nature of interpleader, not a strict bill of interpleader. *Id.* at 610-11, 98 S.Ct. at 3113. Lummis claims an interest in protecting the assets of the Hughes estate from double death tax liability, and asserts that Hughes was domiciled in Nevada, which has no state death tax. Because of his legal duty of preserving the estate's assets, Lummis is an interested stakeholder, not a disinterested one.[11]

This circuit has not decided whether the citizenship of an interested stakeholder may be considered for purposes of establishing the minimal diversity required by section 1335. *Boston Old Colony Insurance Co. v. Balbin*, 591 F.2d 1040, 1042 n.5 (5th Cir. 1979). In the *Treinies* decision in 1939, the Supreme Court held that the citizenship of a stakeholder who did not claim any interest in the deposited fund did not destroy diversity for a strict bill of interpleader although the stakeholder and one of the claimants were citizens of the same state. 308 U.S. at 71-72, 60 S.Ct. at 47. The Court did not discuss whether the citizenship of an interested stakeholder similarly is irrelevant for purposes of diversity. A stakeholder who brings a

[11] In addition, the result of our decision is that the district court will determine Hughes' domicile at death, which will resolve where his intangible property will be administered. In turn, that will determine which administrators will and which will not receive the statutory fee for administering Hughes' intangible property. That fee may well amount to tens of millions of dollars. Because this lawsuit will influence their entitlement to that administration fee, the various administrators are interested parties.

bill in the nature of interpleader asserts a claim to the fund that is adverse to that of the defendant claimants. Because section 1335 requires only that two or more adverse claimants be of diverse citizenship, we hold that the citizenship of an interested stakeholder may be considered for purposes of establishing diversity under section 1335. *Accord, Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F.Supp. 485, 488 (D.Md.1962); *see Pan American Fire & Casualty Co. v. Revere*, 188 F.Supp. 474, 477 & n.8 (E.D.La.1960).[12]

Section 1335 provides that the adverse claimants must be "of diverse citizenship as defined in [28 U.S.C.] section 1332." Under section 1332's diversity rules, as long as the administrator was not named solely for the purpose of creating diversity, *Green v. Hale*, 433 F.2d 324, 326-31 (5th Cir. 1970), the citizenship of the administrator, rather than that of the decedent or the heirs, controls the question whether the federal court has diversity jurisdiction. *Bush v. Carpenter Brothers, Inc.*, 447 F.2d 707, 710-11 (5th Cir. 1971); *Harris v. Johnson*, 345 F.Supp. 516, 517 (N.D.Miss.1972). As Hughes' first cousin and one of his prospective heirs, Lummis clearly has more than a nominal interest in the administration of his estate. Therefore, he clearly was not chosen to be the administrator collusively or "joined to invoke the jurisdiction of [the district] court." 28 U.S.C. § 1359. Because the pleadings indicate that Lummis is a citizen of Nevada, he is a claimant whose citizenship is diverse from that of an adverse claimant, Alvord, the acting county treasurer for Los Angeles County and a

---

[12] Professors Wright and Miller note,

> The declining importance of the classic limitations on interpleader and the acceptance of jurisdiction based on minimal diversity under the statute are evidence of a trend toward the broadest availability of interpleader relief that has been underway since the adoption of the federal rules. Allowing statutory interpleader [when the defendant claimants are citizens of the same state, but an interested stakeholder is diverse,] would be consistent with that trend.

7 C. Wright & A. Miller, *supra* § 1710, at 406 (footnote omitted). *But see* 3A *Moore's Federal Practice, supra* ¶ 22.09[1].

citizen of California. This satisfies the diversity requirement of section 1335.[13]

The California taxing officials argue that the district court erred in failing to join Hughes' prospective heirs as parties under Rule 19 of the Federal Rules of Civil Procedure. Rule 17, however, provides that "[e]very action shall be prosecuted in the name of the real party in interest," and that an "executor, [or] administrator . . . may sue in his own name without joining with him the party for whose benefit the action is brought." Fed.R.Civ.P. 17(a). In performing his duty of preserving the assets of the estate imposed by Texas law, *see* Tex.Prob.Code Ann. §§ 231-33 (Vernon 1980), Lummis is the real party in interest, and the prospective heirs need not be joined. *See Proctor v. Gissendaner*, 579 F.2d 876, 880 (5th Cir. 1978).

IV

In this case we must decide whether the federal system that has spawned Lummis' dilemma of double taxation provides him with a remedy. *California v. Texas*, 437 U.S. at 616, 98 S.Ct. at 3116 (Powell, J., concurring) (quoting Chafee, *Federal Interpleader Since the Act of 1936*, 49 Yale L.J. 377, 388 (1940)). We hold that it does.

Under the common law of Texas as well as that of California, a decedent has only one domicile for death tax purposes. *California v. Texas*, 437 U.S. at 603, 98 S.Ct. at 3109 (Stewart, J., concurring); *see Texas v. Florida*, 306 U.S. at 408, 59 S.Ct. at 568. Because "neither Texas nor California is or will become a party to the proceedings in the other's courts, neither will be bound by an adverse determination of domicile in the

[13] The only administrator whose citizenship differs from that of Lummis is Richard Gano, the California administrator. Because only minimal diversity is required, we find that Gano's California citizenship will not deprive the district court of jurisdiction under section 1335. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. at 530, 87 S.Ct. at 1203.

other's forum." *Id.*, 98 S.Ct. at 3109. Lummis seeks only a determination that will bind both sets of taxing officials[14] and will thus preserve the estate's assets from either total or near-total depletion. Such a determination, rather than impeding the states in enforcing their laws, would effectively implement their rules that death taxes may be imposed only by a state in which a decedent is domiciled at his death and that a decedent may have only one domicile. The equitable bill in the nature of interpleader, codified in section 1335, enables Lummis to obtain a binding domicile determination from a federal tribunal. We hold that the district court has jurisdiction over Lummis' suit; thus we reverse its dismissal order.

REVERSED AND REMANDED

---

[14] Lummis also seeks a declaration of Hughes' domicile for federal estate tax purposes. The United States, however, asserts that such a declaration is barred by 28 U.S.C. § 2201. Section 2201 enables federal courts to "declare the rights and other legal relations of any interested parts" in actual controversies within its jurisdiction "except with respect to Federal taxes." *See California v. Texas*, 437 U.S. at 609 n.10 98 S.Ct. at 3112 n.10 (Stewart, J., concurring). The district court's determination that it lacked diversity jurisdiction caused it to dismiss the case as to all parties and claims, and it did not reach the United States' contentions. Generally, "a reviewing court should remand a case to the district court for consideration of a question not previously considered there . . ." *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17, 25 (5th Cir.), *cert. denied*, 382 U.S. 824, 86 S.Ct. 56, 15 L.Ed.2d 70 (1965). *Accord, Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734-35 (9th Cir. 1978) *cert. denied*, 440 U.S. 935, 99 S.Ct. 1278, 59 L.Ed2d 492 (1979). We therefore decline to consider this issue until the district court has decided it on remand.

Appendix B

United States Court of Appeals

FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

Office of the Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, LA. 70130

December 12, 1980

TO ALL PARTIES LISTED BELOW:

No. 79-2898 WILLIAM RICE LUMMIS, etc.

vs.

MARK WHITE, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By .....BRENDA HAUCK.....
Deputy Clerk

cc: ALL COUNSEL OF RECORD

Appendix C

U.S. COURT OF APPEALS
FILED
JAN 23 - 1981
GILBERT F. GANUCHEAU, Clc

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-2898

WILLIAM RICE LUMMIS,
Texas Temporary Administrator
of the Estate of
Howard R. Hughes, Jr., Deceased,
Plaintiff-Appellant
Cross Appellee,

v.

MARK WHITE, BOB BULLOCK,
KENNETH CORY, H.B. ALVORD, et al.,
Defendants-Appellees
KENNETH CORY, H.B. ALVORD,
Defendants-Appellees
Cross Appellants.

Appeals from the United States
District Court for the
Western District of Texas

ORDER:

IT IS ORDERED that appellees and cross appellants, Kenneth Cory and H. B. Alvord's motion for leave to file a second petition for rehearing out of time is DENIED.

Appendix D

FILED
JUL 27 - 1979
CHARLES W. VAGNER, Clerk
By _____ Deputy

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

WILLIAM RICE LUMMIS and ANNETTE GANO LUMMIS v. MARK WHITE, *et al*	CIVIL ACTION NO. A-78-CA-148

ORDER

On July 10, 1979, oral arguments were heard on the Motions to Dismiss of Defendants Cory and Alvord (hereinafter referred to as the "California Defendants" or "California") and Defendants White and Bullock (hereinafter referred to as the "Texas Defendants" or "Texas"). After careful consideration of the briefs and the arguments of counsel, the Court is of the opinion that the Motions to Dismiss are meritorious and should be granted.

In the way of background suffice it to say that the present action was brought after the State of California petitioned the United States Supreme Court for leave to file a complaint seeking to invoke that court's original jurisdiction. In June of 1978, a unanimous court denied California's motion. *California v. Texas*, 437 U.S. 801 (1978). In concurring opinions four members of the court suggested that the Hughes estate might obtain a judgment under the Federal Interpleader Statute (28 U.S.C. § 1335) that would be binding on both Texas and California and thereby avoid the possibility of conflicting state

court determinations of domicile and death tax liability. Shortly after this opinion the Texas Administrators of the Hughes estate filed the present interpleader action.

After considering the briefs and arguments of able counsel the court is persuaded the interpleader action should be dismissed as this court is without subject matter jurisdiction over the statutory interpleader claim. The Statutory Interpleader Act, 28 U.S.C. § 1335, provides in pertinent part:

> "The District Court shall have original jurisdiction of any civil action . . . in the nature of interpleader filed by any person having in his . . . custody or possession money or property of the value of $500.00 or more . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming or may claim to be entitled to such money or property . . ."

It is the position of the Texas and California Defendants that the Plaintiffs' action does not involve two or more adverse claimants of diverse citizenship as the statute requires. We agree.

By the terms of the statute a claimant must be both adverse and claiming or may claim to be entitled to the money or property in the custody of the stakeholder. The court is of the view that of the parties named by the Plaintiffs in this action, only the United States and the California and Texas taxing officials are claimants under the interpleader statute.

The adverseness in this instance is among the various taxing authorities for they are the only parties "claiming or [who] may claim to be entitled to such money or property" held by the stakeholder. The Plaintiffs argue that the Administrators of the Hughes estate in Nevada and other states are claimants, but it is clear that none of the Administrators have a claim against the money or property in the custody or possession of the plaintiff stakeholder; accordingly none meets the requirement for a claimant. *See Fulton v. Kaiser Steel Corporation*, 397 F.2d 580 (5th Cir. 1968).

The court also notes that the Texas Administrators, the Plaintiffs in this action, and the Administrators of the Hughes estate in other states, named Defendants in the present cause, have the same ultimate interest in the outcome of this litigation. At the hearing on the motions to dismiss Mr. William Rice Lummis, the Texas Administrator and Plaintiff in this matter, admitted during cross-examination that the Plaintiff Administrators and the Defendant Administrators were working in unison toward a common goal. As Professor Wright noted, "[i]t is the court's duty to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute.'" Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3607 citing *City of Dawson v. Columbia Trust Company*, 197 U.S. 178 (1905). The court thus feels that in aligning parties according to their interests it is duty bound to realign the named Defendant Administrators of the Hughes estate with the Plaintiff Administrators. As Plaintiff Administrators, the Administrators of the Hughes estate from the states of Nevada, Delaware, Louisiana, and California are certainly not claimants for the purpose of this statutory interpleader action.

With the United States and the Texas and California taxing officials identified as claimants in this cause, the court now turns its attention to the question of diverse citizenship that the statute requires of the claimants. The Federal Interpleader Act, 28 U.S.C. § 1335, refers to "adverse claimants, of diverse citizenship as defined in Section 1332 of this title." Section 1332 of Title 28, United States Code, provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions . . . between . . . citizens of different States . . ."

There is no question that the United States is not a "citizen of a state" for diversity purposes. *Kent v. Northern California Regional Office of American Friends Service Committee*, 497 F.2d 1325 (9th Cir. 1974). Likewise, there is no question that Defendant H.B. Alvord, the acting County Treasurer for the County of Los Angeles, California is a citizen of the state of California for diversity purposes. *Moor v. County of Alameda*, 411 U.S. 693 (1973). The Court need not consider whether Defendant Kenneth Cory, the acting Controller of the state of

California, is a citizen of that state for diversity purposes as such a finding would not add a "diverse citizenship" to that of Mr. Alvord's.

In determining the citizenship of parties for diversity purposes, the court looks not to the named parties in the complaint, but to the real parties in interest in the litigation. "The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists; the presence of a nominal or formal party is irrelevant for purposes of measuring the court's subject matter jurisdiction." Wright & Miller, Federal Practice and Procedure: Civil § 1556. Were this not the case, parties could circumvent the limits on federal jurisdiction by creating or destroying jurisdiction by merely adding nominal parties to an action.

This principle has been applied in the context of actions by or against state officers or officials where the real party in interest is the state. The Defendants cite the case of *Craig v. Southern Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942), for the proposition that a suit against a state taxing official, growing out of his official duties as a collection agent for the state, is a suit against the state. We agree and find the existence of a similar situation here. The authority by which the Texas Attorney General (White) and the Texas Comptroller (Bullock) act for the state is well documented. *See* TEX. TAX-GEN. ANN. arts. 1.032, 1.032A, 1.10, 14.01, 14.13-14.22; and TEX. REV. CIV. STAT. ANN. arts. 4396 and 4407. As it is clear that the Texas Attorney General and Comptroller act not as individuals, but as agents of the state, and the state is the sole beneficiary of those actions, we find those parties to be purely nominal parties in this action with the state being the real party in interest.

It has long been held that a state is not a citizen of itself for federal diversity purposes. *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894). Thus, the inclusion of the nominal parties White and Bullock does not provide a "claimant of diverse citizenship." After examining all of the "adverse claimants" the court finds that only one has a citizenship for federal diversity purposes. While only minimal diversity is

required under 28 U.S.C. § 1335 [*State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523 (1967)], the statute does require that at least two claimants be of diverse citizenship as defined in 28 U.S.C. § 1332. Here as in *Kent v. Northern California Regional Office of American Friends Service Committee*, 497 F.2d 1325 (9th Cir. 1974), "the requisite diversity is lacking." *Id.* at 1327. Accordingly, the interpleader claim should be dismissed.

The Plaintiffs seek to avoid this result by claiming in their First Amended Complaint that the state taxing officials are acting unconstitutionally. They claim that such action brings those officials under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) where it was held that a suit against a state official alleged to be acting unconstitutionally is not a suit against the state for purposes of the Eleventh Amendment. The Plaintiffs argue that by analogy the court should look to the individual defendant rather than the state in determining the citizenship for federal diversity purposes. The validity of the analogy is a moot point for it is clear that the actions complained of are not unconstitutional.

The Plaintiffs' claim that the threatened collection of a death tax by more than one state constitutes a deprivation of property without due process of law and a denial of equal protection of the laws was considered by the Supreme Court in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). In a case strikingly similar to the present action, the court held that the constitution did not forestall the possibility of conflicts of decisions of the courts of two states. *Id.* at 298. Plaintiffs seek to avoid that precedent by referring to the concurring opinions in *California v. Texas*, 437 U.S. 801 (1978) where a minority of the court intimated that an interpleader action like that in *Worcester County* would no longer be barred by the Eleventh Amendment. This court finds that the fact that the Eleventh Amendment bar may have been removed by *Edelman v. Jordan*, 415 U.S. 651 (1974), has nothing to do with the continuing validity of the *Worcester* court's finding that the acts of the state taxing officials were not unconstitutional. Indeed, Justice Stewart, author of the principal concurring opinion in

California v. Texas, specifically noted that "there is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes estate by proceedings in their own Courts." *California v. Texas*, 46 U.S.L.W. at 4798 n.13 (Stewart, J., concurring).

The Plaintiffs having failed to establish jurisdiction for their statutory interpleader claim, the court now turns to the additional claims the Plaintiffs raised in their First Amended Complaint. In Counts II and III of the complaint the Plaintiffs attempt to establish this court's jurisdiction independent of the interpleader statute. Count II alleges that jurisdiction exists under 28 U.S.C. § 1331, the federal question statute, as the state taxing authorities of Texas and California are violating Plaintiffs' rights because the state court proceeding in neither state can protect the estate from being found liable for death taxes in other states.

This argument warrants little attention. Justice Stone, writing for a unanimous court in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), noted:

> "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries. Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States." (citations omitted).

As previously noted, Justice Stewart in his concurring opinion in *California v. Texas, supra*, pointed out that there was no constitutional impediment to the actions the Plaintiffs complain of. Accordingly, this claim must be dismissed for failure to state a claim upon which relief can be granted.

In Count III of the complaint Plaintiffs allege that the Defendant taxing officials are in violation of the provisions of 42 U.S.C. § 1983. Although some of the claims raised in this Count are quite imaginative, the court is not persuaded by any of these claims. After careful consideration of each point the

court is of the opinion that this count of the complaint should be dismissed as the claims fail to state a claim upon which relief can be granted, or the Plaintiffs are not the proper parties to advance them, or the claims do not present a constitutionally ripe case or controversy.

Having examined the additional grounds raised by the Texas and California Defendants in their Motions to Dismiss and finding them unpersuasive, the court is of the opinion that this action should be dismissed for the reasons set out above.

In closing, the court wishes to note that it is not unsympath[et]ic to the potential plight of the Plaintiffs in this action; however, it is incumbent upon this court, and indeed any federal court, that scrupulously confine its own jurisdiction to the precise limits which a federal statute has defined. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). It is accordingly

ORDERED, ADJUDGED AND DECREED that the Motions to Dismiss of the California Defendants and the Texas Defendants be, and hereby are, GRANTED.

Entered this 27th day of July, 1979, at Austin, Texas.

JACK ROBERTS

United States District Judge

Appendix E

FILED
AUG 8 - 1979
CHARLES W. VAGNER, Clerk
By _____ Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

WILLIAM RICE LUMMIS, et al.

v.

MARK WHITE, et al.

CIVIL ACTION
NO. A-78-CA-148

ORDER

This Court's Order of December 4, 1978, on the Motion of Defendants Cory and Alvord to Add Defendants is hereby withdrawn and the following Order is substituted in its stead.

On November 21, 1978, this Court held a hearing on Defendants Cory and Alvord's Motion to Add Defendants. After careful consideration of the arguments and brief relative to this motion, the Court is of the opinion that Defendants Cory and Alvord's Motion to Add Defendants is without merit, and should be denied.

This suit to determine the domicile of the late Howard Hughes is brought as a statutory interpleader action under 28 U.S.C. § 1335. In *California v. Texas*, ____U.S.____, 46 U.S.L.W. 4795 (June 22, 1978), four members of the Supreme Court suggested such an action as a means of reaching a single, binding determination of the decedent's domicile. The administrators of the Hughes Estate brought the present action in order to reach such a binding determination, and thereby avoid

the possibility of estate taxation by more than one state. Defendants Cory and Alvord (Movants) contend that in order to reach such a binding determination a group of 22 persons, who hold themselves out as the only known heirs of Mr. Hughes, need be joined as Defendants in this action. This Court, indeed all parties to this action, share the Movants' concern with reaching a just, single, and binding resolution of this matter, however, the Court's examination of pertinent authority does not point toward joining this group of heirs as a means to that end.

The Movants claim this group of heirs must be joined as persons needed for the just adjudication of this matter pursuant to Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in pertinent part:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . ."

It is the opinion of this Court that Rule 17 of the Federal Rules of Civil Procedure provides better guidance for the resolution of this matter. Rule 17 provides in pertinent part:

> "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee. . . or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. . . ."

It is the substantive law of the state where the federal court sits that determines the authority of an administrator to act as

the real party in interest. *Boeing Airplane Company v. Perry*, 322 F. 2d 589 (10th Cir. 1963). It is clear that under the Texas law the administrator is authorized to act on behalf of the heirs in this matter. *See* TEX. REV. CIV. STAT., art. 1981, and TEXAS PROBATE CODE §§ 231-233.

The wisdom and common sense behind Rule 17 is especially evident in a situation such as this where an action need be taken to protect the assets of the Estate, but there has yet to be a determination of heirship (or even that Mr. Hughes died intestate).

The fears that the heirs would not be bound by the actions of the administrator would seem to be laid to rest by the Advisory Committee Note to the 1966 Amendment to Rule 17 which pointed out:

> "[T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata."

The relationship between Rule 17 and Rule 19 has been set out by Professor Moore as follows:

> "Rule 17(a) deals in terms with joinder in the case of fiduciaries, providing that an executor, administrator, guardian, bailee, . . . or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. The party for whose benefit the action is brought normally is not, then, a person to be joined if feasible under Rule 19, though they may be if the interest of the fiduciary or representative are antagonistic to those of the parties represented."

3A Moore's Federal Practice ¶ 19.01-1[5-2].

It is very clear that the present case does not fall within the exception Professor Moore noted. Here the interests of the Administrators and the heirs are exactly the same. The Administrator brought this action in order to avoid double

taxation of the estate, and to preserve as much of the estate as possible for distribution. No argument can be made that the interests of the heirs and that of the Administrator are antagonistic in this suit. Indeed here, the Administrator is also an heir.

Movants cite as dispositive precedent for the applicability of Rule 19 the cases *Bry-Man's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963) and *Gottlieb v. Vaicek*, 69 F.R.D. 672 (N.D. 111. 1975). The Court notes that neither of these cases are Rule 17 cases, and if they were, they would fall within the exception Professor Moore noted. In both of these cases a party in privity with another party was required to be joined, but in both instances the person already a party to the suit was found to be incapable of representing the interest of the non-party with whom they were in privity. As previously noted, such is not the case here.

Additional evidence of the binding nature of the present action is found in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). There the Supreme Court noted:

> "And while the general rule is that nonparties to the first action are not bound by a judgment or resulting determination of issues, several exceptions exist. The pertinent exception here is that nonparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties."

In the recent case of *Southwest Airlines v. Texas International Airlines*, 546 F.2d 84 (5th Cir. 1977), the Fifth Circuit Court of Appeals provides an excellent discussion of instances where federal courts have repeatedly held that judgments can bind persons not party to the litigation in question. The court first notes that at common law this preclusive effect extended only to those in privity with the parties. The court then explains that the term "privity" is a legal conclusion that reflects that the relationship between the party of record and the non-party is sufficiently close to afford application of the principle of preclusion. *Id.* at 95. The court finally lists several types of

relationships deemed to be "sufficiently close" to justify preclusion. Of interest here is the third instance the court cited. The present action falls under the heading, "federal courts will bind a non-party whose interests were represented adequately by a party in the original suit". *Id. Citing Heckman v. United States*, 224 U.S. 413 (1912) (United States represents the interest of American Indians), *Kerrison v. Stewart*, 93 U.S. 155 (1876) (trustee represents interests of beneficiaries), *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975) (state represents interests of home-rule county), and *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952) (local government represents interests of the public. The present cause clearly falls under this heading.

The Movants devoted considerable attention to the issue of where the liability attaches for the payment of the California inheritance tax. Movants contend that it falls on the heirs, and therefore they must be joined. The Court notes that under California law the Administrator is initially responsible for the payment of the tax, and is required to deduct any such tax due prior to distribution of estate assets to the beneficiaries. *See* CAL. REV. & TAX. CODE §§ 14101 and 14121 and CAL. PROB. CODE § 1024. *See also Cohn v. Cohn*, 123 P.2d 833, 835 (1942).

Under California law Mrs. Lummis is the sole intestate heir. Mrs. Lummis is a party to the present action, therefore there is no need to add the heirs as parties when the sole heir under California law is already a party to this suit.

The Movants argue that by signing the agreement with the 21 other heirs the Movants seed to add, Mrs. Lummis has made them liable for the payment of the inheritance tax. This is clearly not the case. Liability for the payment of the tax attaches on the death of the decedent, and parties may not later shift the liability by agreement. *Cohn v. Cohn*, 123 P. 2d 833, 835 (1942).

The Movants also claim that Mrs. Lummis would not be bound by a judgment rendered against her in her representative capacity, and would therefore be free to relitigate this matter. Movants cite Professor Moore for the proposition that "a person appearing in a representative capacity is not bound by a

judgment rendered against him as an individual". 1B MOORE'S FEDERAL PRACTICE ¶0.411 [1]. While this is a proper statement of the law, it is totally unrelated to the issue at hand. Here we are concerned with whether a judgment against a person in a representative capacity would be binding on that same person as an individual. It is clear that it would be binding on that individual as it would be on any other member of the group for which the person appeared as a representative.

Additionally, the Supreme Court of California has held that, "[w]here a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other". *Bernhard v. Bank of America National Trust & Savings Association*, 122 P. 2d 892 (1942).

The Court notes in closing that there are various means available to insure that the matters in this suit are not relitigated. *See* 28 U.S.C. § 2283.

While the Court shares the Movants' concern for a final, binding adjudication, it is clear that with the present parties to this action this Court's judgment would bind the Administrators, the heirs, and the taxing authorities of Texas and California. No more is required.

Pursuant to 28 U.S.C. § 1292(b), this Court finds that the motion of Defendants Cory and Alvord and this Order involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal for this order may materially advance the ultimate termination of this litigation.

It is accordingly ORDERED, ADJUDGED AND DECREED that the Motion of Defendants Cory and Alvord to Add Defendants be, and hereby is, DENIED.

Entered this 8th day of August, 1979, at Austin, Texas.

JACK ROBERTS

United States District Judge

Appendix F

FILED
AUG 8 - 1979
CHARLES W. VAGNER, Clerk
By _____ Deputy

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

WILLIAM RICE LUMMIS, et al.

v.

MARK WHITE, et al.

CIVIL ACTION
NO. A-78-CA-148

ORDER

This Court's Order of December 4, 1978 on the Motion of Defendants Cory and Alvord to Change Venue is hereby withdrawn and the following Order is substituted in its stead.

On November 21, 1978, this Court held a hearing on the Motion of Defendants Cory and Alvord to Change Venue. After careful consideration of the arguments and briefs relative to this motion, the Court is of the opinion that the Motion of Defendants Cory and Alvord to Change Venue is without merit, and should be denied.

Defendants Cory and Alvord seek to have venue in this cause changed to the United States District Court for the District of Colorado, or in the alternative, to the Central District of California.

Change of venue is provided for in 28 U.S.C. § 1404, which provides in pertinent part:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The answer to where the present cause might have been brought is found in 28 U.S.C. § 1397. According to this provision:

> "Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

This action was brought by the Texas Administrators of the Hughes Estate in an effort to protect against multiple estate taxation. In a companion motion, the taxing authorities of the state of California (Defendants Cory and Alvord) sought to add as Defendants a group of heirs of Howard Hughes, one of whom allegedly resides in Colorado. The Motion of Defendants Cory and Alvord to Add Defendants was denied by Court Order on November 27, 1978. As no claimant in this action resides in Colorado, Colorado is not a forum in which this action might have been brought, and accordingly, Colorado is not a forum to which a change of venue might be had.

In the alternative, Movants sought transfer of this cause to the Central District of California. In arguing that a change of venue to Colorado would be in the interest of justice, counsel for the Movants claimed that a Texas jury would have a pecuniary interest in the outcome, that regional pride might interfere with an objective verdict, and that there had been too much local publicity. Counsel for the Movants admitted in court that these same claims are not applicable to the State of California. Counsel in effect, if not in fact, has admitted the only factor to look to regarding a change of venue to California is the convenience of parties and witnesses.

Generally, the burden is on the moving party to justify the transfer, and the balance need usually be strongly in the movants favor. *See Wm. A. Smith Contracting Co., Inc., v. Travelers Indemnity Co.*, 467 F. 2d 662 (10th Cir. 1972). See

also *Vasquez v. Falcon Coach Co., Inc.*, 376 F. Supp. 815 (D.N.D. 1976). While it is clear that the California forum would be more convenient to the California Defendants and witnesses, it is equally clear that this forum is the more convenient for the Texas Defendants, the Administrator of the Estate, and the Texas witnesses. As transfer is not appropriate if it would merely shift the inconvenience from one party to another, the Movants have failed to justify the transfer of this cause. *See Hess Oil Virgin Islands Corporation v. UOP, Inc.*, 447 F. Supp. 381 (N.D. Okla. 1978) and *Residex Corporation v. Farrow*, 374 F. Supp. 715 (E.D. Penn. 1974).

Pursuant to 28 U.S.C. § 1292(b), this Court finds that the motion of Defendants Cory and Alvord and this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal for this order may materially advance the ultimate termination of this litigation.

It is accordingly ORDERED, ADJUDGED and DECREED that the Motion of Defendants Cory and Alvord to Add Defendants be, and hereby is, DENIED.

Entered this 8th day of August, 1979, at Austin, Texas.

JACK ROBERTS

United States District Judge

Appendix G

FILED
AUG 20 - 1979
CHARLES W. VAGNER, Clerk
By _____ Deputy

IN THE

UNITED STATES DISTRICT COURT

FOR THE
WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

WILLIAM RICE LUMMIS, Surviving Texas Temporary Administrator of the Estate of Howard R. Hughes, Jr., Deceased,

Plaintiff,

vs.

MARK WHITE, Attorney General of the State of Texas; BOB BULLOCK, Comptroller of Public Accounts of the State of Texas; KENNETH CORY, Controller of the State of California; H. B. ALVORD, County Treasurer for the County of Los Angeles; WILLIAM RICE LUMMIS and FIRST NATIONAL BANK OF NEVADA, Nevada Co-Special Administrators of the Estate of Howard R. Hughes, Jr., Deceased; WILLIAM RICE LUMMIS, Delaware Ancillary Administrator of the Estate of Howard R. Hughes, Jr., Deceased; WILLIAM RICE LUMMIS, Louisiana Provisional Administrator of the Estate of Howard R. Hughes, Jr., Deceased; RICHARD GANO, California General Administrator of the Estate of Howard R. Hughes, Jr., Deceased; and THE UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION
NO. A-78-CA-148

ORDER

This Court having concluded in its Order of July 27, 1979, that it did not have subject matter jurisdiction of this action,

It is ORDERED, ADJUDGED and DECREED that the above styled and numbered action is DISMISSED as to all parties and as to all claims and the Clerk is directed to enter a judgment conforming hereto.

DATED: August 20, 1979.

JACK ROBERTS

United States District Judge

Appendix H

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE
WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

WILLIAM RICE LUMMIS, Surviving Texas Temporary Administrator of the Estate of Howard R. Hughes, Jr., Deceased vs. MARK WHITE, Attorney General, State of Texas, et al.	CIVIL ACTION FILE No. A-78-CA-148 **JUDGMENT**

This action came on for trial (hearing) before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the above styled and numbered action is DISMISSED as to all parties and as to all claims and final judgment is herewith entered.

Dated at Austin, Texas, this 20th day of August 1979.

CHARLES W. VAGNER
Clerk of Court

WANDA V. PETERSON
Wanda V. Peterson, *Deputy Clerk*

Appendix I

A. Before the passage of AB 2092 in 1980, Sections 14104, 14791 and 14793-95, of the California Revenue & Taxation Code read as follows:

California Revenue & Taxation Code § 14104:

§ 14104. Payment to county treasurer

Every tax imposed by this part shall be paid to the county treasurer as provided in this chapter.

California Revenue & Taxation Code § 14791:

§ 14791. Duty to receive payment of taxes, etc.

The treasurer of each county shall receive payment of all taxes and other money that may be due and payable under this part.

California Revenue & Taxation Code § 14793:

§ 14793. Payment to State Treasurer; time; statement

With the exception of such money as he may pay out from time to time pursuant to this part, the county treasurer shall pay to the State Treasurer all money received by him under this part within 15 days after the receipt of the money; provided that counties of less than 25,000 population may elect to make payments to the State Treasurer on a monthly basis, in which case, such payments shall be made to the State Treasurer within five days following the close of the monthly period. The county treasurer shall submit with the payment a statement in such form and containing such particulars, including the name of the estate, if any, from which the money was received, as the Controller shall prescribe.

California Revenue & Taxation Code § 14794:

§ 14794. Interest on money not paid to State Treasurer

On all money received by him under this part which he does not pay to the State Treasurer within the time prescribed by Section 14793, the county treasurer shall pay interest at the rate of 10 percent per annum.

California Revenue & Taxation Code § 14795

§ 14795. Commissions

(a) For services performed pursuant to this part, the county may retain out of the inheritance taxes paid to and accounted for by the county treasurer each fiscal year, commencing July 1 and ending June 30, commissions as follows:

If the collections are:	The commissions are:
Not over $250,000	2.5% of the collections
Over $250,000 but not over $1,000,000	$6,250 plus 1% of excess over $250,000
Over $1,000,000 but not over $2,000,000	$13,750 plus 0.5% of excess over $1,000,000
Over $2,000,000 but not over $8,000,000	$18,750 plus 0.4% of excess over $2,000,000
Over $8,000,000 but not over $100,000,000	$42,750 plus 0.16% of excess over $8,000,000
Over $100,000,000	$189,950 plus 0.1% over $100,000,000

(b) A county may retain an additional 20 percent of the commissions computed pursuant to subdivision (a), if such county contains:

(1) An area exceeding 10,000 square miles or,

(2) A population density of less than five per square mile at the time of the last regular federal census.

(c) A county qualifying under both paragraph (1) and paragraph (2) of subdivision (b) shall be entitled to only one 20-percent increment in commissions.

B. On January 1, 1981, Assembly Bill No. 2092 (Chapter 634 of the 1980 California Statutes) became effective. It reads in full as follows:

TAXATION—INHERITANCE AND GIFT TAXES

CHAPTER 634

ASSEMBLY BILL NO. 2092

An act to amend Sections 657, 1001, 1004, 1024, and 1174 of the Probate Code, and to amend Sections 13311, 13801, 13802, 13803, 13805, 14104, 14128, 14143.5, 14211, 14345, 14347, 14774, 15310, 15421, 15422 and 15423 of, to add Sections 13311.5, 14180, 14181, 14182, and 14902 to, and to repeal Sections 13314, 13551, 13552.5, 13554, 13554.5, 13555, 13556, 13556.5, 13557, 14141, 14142, 14143, 14144, 14342, 14343, 14344, 14346, 14791, 14792, 14793, 14794, 14795, and 14798 of, and to repeal Sections 15104.5, 15301, 15301.5, and 15303.5 of, the Revenue and Taxation Code, relating to taxation, and making an appropriation therefor, to take effect immediately, tax levy.

LEGISLATIVE COUNSEL'S DIGEST

Under California's existing Inheritance Tax Law, a death tax is imposed in the form of an inheritance tax measured by the share of a decedent's estate passing to each beneficiary, with the tax rates varying in accordance with the amount received by each such beneficiary and in accordance with such beneficiary's relationship to the decedent. Under existing law, procedures have been established for the determination and payment of such inheritance taxes.

This bill would revise such procedures, and would generally exempt all property transferred to a spouse from inheritance and gift taxes, and would increase the existing amounts which are exempt from these taxes.

The existing provisions of the Probate Code prohibit an order or decree distributing an estate unless all inheritance taxes have been paid or unless the State Controller has consented to the distribution.

This bill would repeal those provisions in the Probate Code prohibiting distribution unless the inheritance taxes have been paid.

This bill would appropriate $400,000 to the Controller for the purpose of administering the act.

This bill would take effect immediately as a tax levy and shall apply in the computation of inheritance and gift taxes with respect to the computation of gifts and death occurring on and after January 1, 1981.

The people of the State of California do enact as follows:

SECTION 1. Section 657 of the Probate Code is amended to read:

657.

(a) Upon the filing of a petition pursuant to Section 650, the court shall immediately appoint one inheritance tax referee who shall appraise the property described in the petition in the same manner provided in Section 605 and file an inheritance tax report or certification that no tax is due with the clerk of the court. Upon the filing of the inheritance tax report, the court shall enter an order fixing the inheritance tax in the same manner and subject to all other provisions of law relating to the administration of the estate of a decedent which is not subject to the provisions of this article. The filing of an inheritance tax report and the entry of an order fixing the inheritance tax under this article shall not limit the filing of additional reports and the entry of additional orders fixing the inheritance tax as to any other property of the deceased spouse giving rise to additional inheritance tax liability. * * *

(b) * * * The petitioner shall furnish the referee with a copy of the petition and all other necessary information and documentation as may be required by law for the referee to prepare the inheritance tax report or issue the certification that no tax is due with reference to the property described in the petition. Within 60 days after the receipt of the petition and information and documentation by the referee, as may be evidenced by an affidavit which is filed in the proceedings by the petitioner and served by mail on the referee, the referee shall make the appraisal and file the inheritance tax report or

---

deletion by asterisks * * *

the certification that no tax is due with the clerk of the court. If the referee does not comply with the provisions of this subdivision, the court may issue any orders which may be necessary to effect compliance.

SEC. 1.3. Section 1001 of the Probate Code is amended to read:

1001.

If, at the hearing, it appears that all of the allegations of the petition are true, that the estate is but little indebted * * * and the legacy, devise or share of the estate or any portion thereof may be distributed without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the share, or shares, of the estate or such portion or portions thereof as the court may direct, to the person or persons entitled thereto, upon receiving from such person or persons a bond or bonds executed and payable to the executor or administrator, in such sum or sums as the court may designate, conditioned on the payment whenever required of the proportion of the debts due from the estate, not exceeding the amount of the legacy or portions of the estate so ordered to be delivered; or if the time for filing claims has expired and all claims are paid or sufficiently secured the court may so order distribution with or without bond as it may determine.

SEC. 1.4. Section 1004 of the Probate Code is amended to read:

1004.

When the time for filing or presenting claims has expired and all uncontested claims have been paid or are sufficiently secured by mortgage, or otherwise, but the estate is not in a condition to be finally closed and distributed, the executor or administrator to whom authority has been granted to administer the estate without court supervision, in accordance with Article 2 (commencing with Section 591) of Chapter 8 of Division 3, may petition the court for authority to distribute a

---

deletion by asterisks * * *

portion of the estate to the person or persons entitled thereto. Such petition need not include an accounting, provided that when the petition seeks authority to distribute to a trustee the petition shall include an accounting unless the trustee consents to the distribution without an accounting. The total amount of the property distributed under this section shall not exceed 50 percent of the net value of the estate. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200, but the court may order the notice to be given for a shorter period or dispensed with. If the court shall determine that all of the allegations of the petition are true, that the estate is but little indebted, * * * that the property to be distributed does not exceed 50 percent of the net value of the estate, and that the distribution may be made without loss or injury to the estate or any person interested therein, the court shall make an order authorizing the executor or administrator to distribute the property to the person or persons entitled thereto. For purposes of this section "net value of the estate" means the excess of the value of the assets of the estate reflected by all inventories and appraisements on file with the court over the total amount of all creditors' claims filed or presented and liens and encumbrances recorded or known to the executor or administrator not reflected in any creditors' claims filed or presented, excluding death tax liens occasioned by the decedent's death.

SEC. 1.5. Section 1024 of the Probate Code is amended to read:

1024.

Before any decree of distribution is made all personal property taxes due and payable by the estate shall be paid * * *.

SEC. 1.6. Section 1174 of the Probate Code is amended to read:

1174.

Such petition, or affidavits in support thereof, may be received in evidence and acted upon by the court with the same

---

deletion by asterisks * * *

force and effect as if the petitioner or affiants were personally present and testified to the fact set forth, and the court may render judgment thereon establishing the fact of the death, which judgment shall be prima facie evidence of the fact of the death. The presumption established by this section is a presumption affecting the burden of producing evidence. * * *

SEC. 2. Section 13311 of the Revenue and Taxation Code is amended to read:

13311.

"Market value," in respect to property included in any transfer, means the market value of the property as of the date of the transferor's death, whether or not the transfer was made during the lifetime of the transferor.

SEC. 2.3. Section 13311.5 is added to the Revenue and Taxation Code, to read:

13311.5.

(a) Certain qualified real property shall be valued based on use in accordance with this section.

(1) If—

(A) The decedent was (at the time of his or her death) a citizen or resident of the United States, and

(B) The executor elects the application of this section for purposes of the tax imposed by this part, then, for purposes of this part, the value of qualified real property shall be its value for the use under which it qualifies, under subdivision (b), as qualified real property.

(2) The aggregate decrease in the value of qualified real property taken into account for purposes of this chapter which results from the application of paragraph (1) with respect to any decedent shall not exceed five hundred thousand dollars ($500,000).

---

deletion by asterisks * * *

(b) Qualified real property is as follows:

(1) For purposes of this section, the term "qualified real property" means real property located in the United States which was acquired from or passed from the decedent to a qualified heir of the decedent and which, on the date of the decedent's death, was being used for a qualified use, but only if—

(A) Fifty percent or more of the adjusted value of the clear market value of the estate consists of the adjusted value of real or personal property which—

(i) On the date of the decedent's death, was being used for a qualified use, and

(ii) Was acquired from or passed from the decedent to a qualified heir of the decedent.

(B) Twenty-five percent or more of the adjusted value of the clear market value of the estate consists of the adjusted value of real property which meets the requirements of subparagraphs (A)(ii) and (C),

(C) During the eight-year period ending on the date of the decedent's death there have been periods aggregating five years or more during which—

(i) Such real property was owned by the decedent or a member of the decedent's family and used for a qualified use, and

(ii) There was material participation by the decedent or a member of the decedent's family in the operation of the farm or other business, and

(D) Such real property is designated in the agreement referred to in paragraph (2) of subdivision (d).

(2) For purposes of this section, the term "qualified use" means the devotion of the property to any of the following:

(A) Use as a farm for farming purposes, or

(B) Use in a trade or business other than the trade or business of farming.

(3) For purposes of paragraph (1), the term "adjusted value" means—

(A) The value of the estate for purposes of this chapter (determined without regard to this section), reduced by any amounts allowable as a deduction for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the estate, or

(B) In the case of any real or personal property, the value of such property for purposes of this chapter (determined without regard to this section), reduced by any amounts allowable as a deduction in respect of such property for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the estate.

(c) Tax treatment of dispositions and failures to use for a qualified use are as follows:

(1) If, within 15 years after the decedent's death and before the death of the qualified heir—

(A) The qualified heir disposes of any interest in qualified real property (other than by a disposition to a member of his or her family), or

(B) The qualified heir ceases to use for the qualified use the qualified real property which was acquired (or passed) from the decedent, then there is hereby imposed an additional tax.

(2) Amount of additional tax—

(A) The amount of the additional tax imposed by paragraph (1) with respect to any interest shall be the amount equal to the lesser of—

(i) The adjusted tax difference attributable to such interest, or

(ii) The excess of the amount realized with respect to the interest (or, in any case other than a sale or exchange at arm's

length, the fair market value of the interest) over the value of the interest determined under subdivision (a).

(B) For purposes of subparagraph (A), the adjusted tax difference attributable to an interest is the amount which bears the same ratio to the adjusted tax difference with respect to the estate (determined under subparagraph (C)) as—

(i) The excess of the value of such interest for purposes of this chapter (determined without regard to subdivision (a)) over the value of such interest determined under subdivision (a), bears to

(ii) A similar excess determined for all qualified real property.

(C) For purposes of subparagraph (B), the term "adjusted tax difference with respect to the estate" means the excess of what would have been the tax liability but for subdivision (a) over the tax liability. For purposes of this subparagraph, the term "tax liability" means the tax imposed by this part reduced by the credits allowable against such tax.

(D) For purposes of this paragraph, where the qualified heir disposes of a portion of the interest acquired by (or passing to) such heir (or a predecessor qualified heir) or there is a cessation of use of such a portion—

(i) The value determined under subdivision (a) taken into account under subparagraph (A)(ii) with respect to such portion shall be its pro rata share of such value of such interest, and

(ii) The adjusted tax difference attributable to the interest taken into account with respect to the transaction involving the second or any succeeding portion shall be reduced by the amount of the tax imposed by this subdivision with respect to all prior transactions involving portions of such interest.

(3) If the date of the disposition or cessation referred to in paragraph (1) occurs more than 120 months and less than 180 months after the date of the death of the decedent, the amount of the tax imposed by this subdivision shall be reduced (but not below zero) by an amount determined by multiplying the amount of such tax (determined without regard to this paragraph) by a fraction—

(A) The numerator of which is the number of full months after such death in excess of 120, and

(B) The denominator of which is 60.

(4) In the case of an interest acquired from (or passing from) any decedent, if subparagraph (A) or (B) of paragraph (1) applies to any portion of an interest, subparagraph (B) or (A), as the case may be, of paragraph (1) shall not apply with respect to the same portion of such interest.

(5) The additional tax imposed by this subsection shall become due and payable on the day which is six months after the date of the disposition or cessation referred to in paragraph (1).

(6) The qualified heir shall be personally liable for the additional tax imposed by this subdivision with respect to his or her interest unless the heir has furnished a bond which meets the requirements of subdivision (e)(11).

(7) For purposes of paragraph (1)(B), real property shall cease to be used for the qualified use if—

(A) Such property ceases to be used for the qualified use set forth in subparagraph (A) or (B) of subsection (b)(2) under which the property qualified under subdivision (b), or

(B) During any period of eight years ending after the date of the decedent's death and before the date of the death of the qualified heir, there had been periods aggregating three years or more during which—

(i) In the case of periods during which the property was held by the decedent, there was no material participation by the decedent or any member of his or her family in the operation of the farm or other business, and

(ii) In the case of periods during which the property was held by any qualified heir, there was no material participation by such qualified heir or any member of his or her family in the operation of the farm or other business.

(d) Elections and agreements are as follows—

(1) The election under this section shall be made not later than the time prescribed by Section 14103 (including exten-

sions thereof), and shall be made in such manner as the Controller shall by regulations prescribe.

(2) The agreement referred to in this paragraph is a written agreement signed by each person in being who has an interest (whether or not in possession) in any property designated in such agreement consenting to the application of subdivision (c) with respect to such property.

(e) For purposes of this section—

(1) The term "qualified heir" means, with respect to any property, a member of the decedent's family who acquired such property (or to whom such property passed) from the decedent. If a qualified heir disposes of any interest in qualified real property to any member of his or her family, such member shall thereafter be treated as the qualified heir with respect to such interest.

(2) The term "member of the family" means, with respect to any individual, only such individual's ancestor or lineal descendant, a lineal descendant of a grandparent of such individual, the spouse of such individual, or the spouse of any such descendant. For purposes of the preceding sentence, a legally adopted child of an individual shall be treated as a child of such individual by blood.

(3) In the case of real property which meets the requirements of subparagraph (C) of subdivision (b)(1), residential buildings and related improvements of such real property occupied on a regular basis by the owner or lessee of such real property or by persons employed by such owner or lessee for the purpose of operating or maintaining such real property, and roads, buildings, and other structures and improvements functionally related to the qualified use shall be treated as real property devoted to the qualified use.

(4) The term "farm" includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards and woodlands.

(5) The term "farming purposes" means—

(A) Cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm;

(B) Handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state, but only if the owner, tenant, or operator of the farm regularly produces more than one-half of the commodity so treated; and

(C)(i) The planting, cultivating, caring for, or cutting of trees, or

(ii) The preparation (other than milling) of trees for market.

(6) Material participation shall be determined in a manner similar to the manner used for purposes of paragraph (1) of Section 1402(a) of the Internal Revenue Code (relating to net earnings from self-employment).

(7) Method of valuing farms as follows—

Except as provided in subparagraph (B), the value of a farm for farming purposes shall be determined by dividing—

(i) The excess of the average annual gross cash rental for comparable land used for farming purposes and located in the locality of such farm over the average annual state and local real estate taxes for such comparable land, by

(ii) The average annual effective interest rate for all new Federal Land Bank loans.

For purposes of the preceding sentence, each average annual computation shall be made on the basis of the five most recent calendar years ending before the date of the decedent's death.

The formula provided by subparagraph (A) shall not be used—

(i) Where it is established that there is no comparable land from which the average annual gross cash rental may be determined, or

(ii) Where the executor elects to have the value of the farm for farming purposes determined under paragraph (8).

(8) In any case to which paragraph (7)(A) does not apply, the following factors shall apply in determining the value of any qualified real property:

(A) The capitalization of income which the property can be expected to yield for farming or closely held business purposes over a reasonable period of time under prudent management using traditional cropping patterns for the area, taking into account soil capacity, terrain configuration, and similar factors.

(B) The capitalization of the fair rental value of the land for farmland or closely held business purposes.

(C) Assessed land values in a state which provides a differential or use value assessment law for farmland or closely held business.

(D) Comparable sales of other farm or closely held business land in the same geographical area far enough removed from a metropolitan or resort area so that nonagricultural use is not a significant factor in the sales price, and

(E) Any other factor which fairly values the farm or closely held business value of the property.

(9) Property shall be considered to have been acquired from or to have passed from the decedent if—

(A) Such property is so considered under Section 1014(b) of the Internal Revenue Code (relating to basis of property acquired from a decedent),

(B) Such property is acquired by any person from the estate in satisfaction of the right of such person to a pecuniary bequest, or

(C) Such property is acquired by any person from a trust in satisfaction of a right (which such person has by reason of the death of the decedent) to receive from the trust a specific dollar amount which is the equivalent of a pecuniary bequest.

(10) If the decedent and his or her surviving spouse at any time held qualified real property as community property, the interest of the surviving spouse in such property shall be taken into account under this section to the extent necessary to

provide a result under this section with respect to such property which is consistent with the result which would have obtained under this section if such property had not been community property.

(11) If the qualified heir makes written application to the Controller for determination of the maximum amount of the additional tax which may be imposed by subdivision (c) with respect to the qualified heir's interest, the Controller (as soon as possible, and in any event within one year after the making of such application) shall notify the heir of such maximum amount. The qualified heir, on furnishing a bond in such amount and for such period as may be required, shall be discharged from personal liability for any additional tax imposed by subdivision (c) and shall be entitled to a receipt or writing showing such discharge.

(f) If qualified real property is disposed of or ceases to be used for a qualified use, then—

(1) The statutory period for the assessment of any additional tax under subdivision (c) attributable to such disposition or cessation shall not expire before the expiration of three years from the date the Controller is notified (in such manner as the Controller may by regulations prescribe) of such disposition or cessation (or if later in the case of an involuntary conversion to which an election under subdivision (h) applies, three years from the date the Controller is notified of the replacement of the converted property or of an intention not to replace); and

(2) Such additional tax may be assessed before the expiration of such three-year period notwithstanding the provisions of any other law or rule of law which would otherwise prevent such assessment.

(h) Special rules for involuntary conversion of qualified real property are as follows:

(1)(A) If there is an involuntary conversion of an interest in qualified real property and the qualified heir makes an election under this subdivision—

(i) No tax shall be imposed by subdivision (c) on such conversion if the cost of the qualified replacement property equals or exceeds the amount realized on such conversion, or

(ii) If clause (i) does not apply, the amount of the tax imposed by subdivision (c) on such conversion shall be the amount determined under subparagraph (B).

(B) The amount determined under this subparagraph with respect to any involuntary conversion is the amount of the tax which (but for this subdivision) would have been imposed on such conversion reduced by an amount which—

(i) Bears the same ratio to such tax, as

(ii) The cost of the qualified replacement property bears to the amount realized on the conversion.

(2) For purposes of subdivision (c)—

(A) Any qualified replacement property shall be treated in the same manner as it if were a portion of the interest in qualified real property which was involuntarily converted, except that with respect to such qualified replacement property—

(i) The 15-year period under paragraph (1) of subdivision (c) shall be extended by any period, beyond the two-year period referred to in Section 1033(a)(2)(B)(i) of the Internal Revenue Code, during which the qualified heir was allowed to replace the qualified real property, and

(ii) The phaseout period under paragraph (3) of subdivision (c) shall be appropriately adjusted to take into account the extension referred to in clause (i).

(B) Any tax imposed by subdivision (c) on the involuntary conversion shall be treated as a tax imposed on a partial disposition, and

(C) Paragraph (7) of subdivision (c) shall be applied—

(i) By not taking into account periods after the involuntary conversion and before the acquisition of the qualified replacement property, and

(ii) By treating material participation with respect to the converted property as material participation with respect to the qualified replacement property.

(3) For purposes of this subdivision—

(A) "Involuntary conversion" means a compulsory or involuntary conversion within the meaning of Section 1033 of the Internal Revenue Code.

(B) The term "qualified replacement property" means—

(i) In the case of an involuntary conversion described in Section 1033(a)(1) of the Internal Revenue Code, any real property into which the qualified real property is converted, or

(ii) In the case of an involuntary conversion described in Section 1033(a)(2) of the Internal Revenue Code, any real property purchased by the qualified heir during the period specified in Section 1033(a)(2)(B) of the Internal Revenue Code for purposes of replacing the qualified real property.

Such term only includes property which is to be used for the qualified use set forth in subparagraph (A) or (B) of subdivision (b)(2) under which the qualified real property qualified under subdivision (a).

(4) The rules of the last sentence of Section 1033(a)(2)(A) of the Internal Revenue Code shall apply for purposes of paragraph (3)(b)(ii).

(5) Any election under this subdivision shall be made at such time and in such manner as the Controller may by regulations prescribe.

SEC. 2.5. Section 13314 of the Revenue and Taxation Code is repealed.

SEC. 3. Section 13551 of the Revenue and Taxation Code is repealed.

SEC. 4. Section 13552.5 of the Revenue and Taxation Code is repealed.

SEC. 5. Section 13554 of the Revenue and Taxation Code is repealed.

SEC. 6. Section 13554.5 of the Revenue and Taxation Code is repealed.

SEC. 7. Section 13555 of the Revenue and Taxation Code is repealed.

SEC. 8. Section 13556 of the Revenue and Taxation Code is repealed.

SEC. 9. Section 13556.5 of the Revenue and Taxation Code is repealed.

SEC. 10. Section 13557 of the Revenue and Taxation Code is repealed.

SEC. 11. Section 13801 of the Revenue and Taxation Code is amended to read:

13801.

(a) Property of the clear market value of * * * forty thousand dollars * * * ($40,000) transferred to * * * a minor child of the decedent is exempt from the tax imposed by this part.

(b) Property of the clear market value of * * * an amount equal to ten thousand dollars * * * ($10,000) multiplied by the excess of 21 over the age (in years) of a child of the decedent who is under the age of 18 at the date of death of the decedent, provided the decedent does not have a surviving spouse and that such child, immediately after the death of the decedent, has no known parent, is exempt from the tax imposed by this part. * * *

(c) * * * Property of the clear market value of * * * twenty thousand dollars * * * ($20,000) transferred to any other class A transferee, other than the spouse of the decedent, is exempt from the tax imposed by this part.

SEC. 12. Section 13802 of the Revenue and Taxation Code is amended to read:

---

deletion by asterisks * * *

13802.

Property of the clear market value of * * * ten thousand dollars * * * ($10,000) transferred to any class B transferee is exempt from the tax imposed by this part.

SEC. 13. Section 13803 of the Revenue and Taxation Code is amended to read:

13803.

Property of the clear market value of three * * * thousand dollars * * * ($3,000) transferred to any class C transferee is exempt from the tax imposed by this part.

SEC. 15. Section 13805 of the Revenue and Taxation Code is amended to read:

13805.

* * * None of the property transferred to the spouse of the decedent is subject to this part, except that if a limited power of appointment over any portion or all of the decedent's property is given to the spouse of the decedent, the value of such property is subject to this part; provided, however, that the value of any interest, other than the power itself, given to the spouse of the decedent in such property is not subject to this part.

SEC. 15.2. Section 14104 of the Revenue and Taxation Code is amended to read:

14104.

Every tax imposed by this part shall be paid to the * * * Controller by remittance payable to the State Treasurer.

SEC. 15.3. Section 14128 of the Revenue and Taxation Code is amended to read:

14128.

Within 30 days after the date of the deduction or collection of a tax by him or her, the executor, administrator, or trustee shall pay the tax to the * * * Controller by remittance payable to the State Treasurer.

---

deletion by asterisks * * *

SEC. 15.4. Section 14141 of the Revenue and Taxation Code is repealed.

SEC. 15.5. Section 14142 of the Revenue and Taxation Code is repealed.

SEC. 16. Section 14143 of the Revenue and Taxation Code is repealed.

SEC. 16.5. Section 14143.5 of the Revenue and Taxation Code is amended to read:

14143.5.

If the Controller finds that payment of any tax imposed by this part * * * would result in undue hardship to the estate, he may enter into a written agreement for payment of the tax with the executor, administrator, trustee or transferee liable for its payment upon such terms and conditions as the Controller in his discretion may provide, and provided that the Controller finds that payment of the tax plus interest due thereon is adequately secured.

Undue hardship shall include, but not be limited to, the hardship resulting from the payment of taxes imposed pursuant to the provisions of this part on class A or class B beneficiaries on a qualified family property, and shall include the inability to secure a loan against such qualified property at a rate of interest at the rate specified in subdivision (b) of Section 14211 or less or the necessity for selling an interest in a family business to unrelated persons. * * *

SEC. 16.7. Section 14144 of the Revenue and Taxation Code is repealed.

SEC. 17. Section 14180 is added to the Revenue and Taxation Code, to read:

14180.

The Controller may, for reasonable cause, provided that the Controller finds that payment of the tax plus interest is adequately secured, extend the time for payment of any part of the amount determined as the tax imposed by this part, or any

---

deletion by asterisks * * *

part of any installment under Section 14105, 14181, or 14182 for a reasonable period not in excess of 10 years from the date prescribed by Section 14103 for payment of the tax or, in the case of an installment amount referred to in this section, if later, not beyond the date which is 12 months after the due date for the last installment.

For purposes of this section, "reasonable cause" includes the circumstances of a taxpayer who is a beneficiary of some or all of the decedent's works of art, if the decedent is an artist and if the value of an interest in works in art created by such decedent artist which is included in determining the gross estate of a decedent artist exceeds:

(a) Thirty-five percent of the value of the gross estate of such decedent artist, or

(b) Fifty percent of the taxable estate of such decedent artist.

For purposes of this paragraph, "works of art" are defined pursuant to paragraph (1) of subdivision (a) of Section 217, and an "artist" is an individual who creates such "works of art."

SEC. 18. Section 14181 is added to the Revenue and Taxation Code, to read:

14181.

(a)(1) If the value of an interest in a closely held business which is included in determining the market value of the estate of a decedent who was (at the date of his or her death) a citizen or resident of the United States exceeds 65 percent of the clear market value of the estate, the executor may elect to pay part or all of the tax imposed by this part in two or more (but not exceeding 10) equal installments.

(2) The maximum amount of tax which may be paid in installments under this subdivision shall be an amount which bears the same ratio to the tax imposed by this part (reduced by the credits against such tax) as—

(A) The closely held business amount, bears to

(B) The amount of the clear market value of the estate.

(3) If an election is made under paragraph (1), the first installment shall be paid on or before the date selected by the executor which is not more than five years after the date prescribed by Section 14103, and each succeeding installment shall be paid on or before the date which is one year after the date prescribed by this paragraph for payment of the preceding installment.

(4) No election may be made under this section by the executor of the estate of any decedent if an election under Section 14182 applies with respect to the estate of such decedent.

(b)(1) For purposes of this section, "interest in a closely held business" means any of the following:

(A) An interest as a proprietor in a trade or business carried on as a proprietorship.

(B) An interest as a partner in a partnership carrying on a trade or business, if either of the following applies:

(i) Twenty percent or more of the total capital interest in such partnership is included in determining the market value of the estate of the decedent.

(ii) Such partnership had 15 or fewer partners.

(C) Stock in a corporation carrying on a trade or business if either of the following applies:

(i) Twenty percent or more in value of the voting stock of such corporation is included in determining the market value of the estate of the decedent.

(ii) Such corporation had 15 or fewer shareholders.

(2) For purposes of paragraph (1):

(A) Determinations shall be made as of the time immediately before the decedent's death.

(B) Stock or a partnership interest which—

(i) Is community property of a husband and wife (or the income from which is community income), or

(ii) Is held by a husband and wife as joint tenants, or tenants in common, shall be treated as owned by one shareholder or one partner, as the case may be.

(C) Property owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries. For purposes of the preceding sentence a person shall be treated as a beneficiary of any trust only if such person has a present interest in the trust.

(D) All stock and all partnership interests held by the decedent or by any member of his family (within the meaning of Section 267(c)(4) of the Internal Revenue Code) shall be treated as owned by the decedent.

(3) For purposes of the 65-percent requirement of paragraph (1) of subdivision (a), an interest in a closely held business which is the business of farming includes an interest in residential buildings and related improvements on the farm which are occupied on a regular basis by the owner or lessee of the farm or by persons employed by such owner or lessee for purposes of operating or maintaining the farm.

(4) For purposes of this section, value shall be value determined for purposes of this part.

(5) For purposes of this section, "closely held business amount" means the value of the interest in a closely held business which qualifies under subdivision (a)(1).

(6) (A) If the executor elects the benefits of this paragraph (at such time and in such manner as the Controller shall by regulations prescribe), then—

(i) For purposes of paragraph (1)(B)(i) or (1)(C)(i) (whichever is appropriate) and for purposes of subdivision (c), any capital interest in a partnership and any nonreadily tradable stock which (after the application of paragraph (2)) is treated as owned by the decedent shall be treated as included in determining the value of the market value of the decedent's estate, and

(ii) The executor shall be treated as having selected under subsection (a)(3) the date prescribed by Section 14103.

(B) For purposes of this paragraph, the term "nonreadily tradable stock" means stock for which, at the time of the decedent's death, there was no market on a stock exchange or in an over-the-counter market.

(c) For purposes of this section, interests in two or more closely held businesses, with respect to each of which there is included in determining the value of the decedent's gross estate more than 20 percent of the total value of each such business, shall be treated as an interest in a single closely held business. For purposes of the 20-percent requirement of the preceding sentence, an interest in a closely held business which represents the surviving spouse's interest in property held by the decedent and the surviving spouse as community property or as joint tenants or tenants in common shall be treated as having been included in determining the value of the market value of the decedent's estate.

(d) Any election under subdivision (a) shall be made not later than the time prescribed by Section 14103. If an election under subdivision (a) is made, the provisions of this chapter shall apply as though the Controller were extending the time for payment of the tax.

(e) If an election is made under subdivision (a) to pay any part of the tax imposed by this part in installments and a deficiency has been assessed, the deficiency shall (subject to the limitation provided by paragraph (2) of subdivision (a)) be prorated to the installments payable under subdivision (a). The part of the deficiency so prorated to any installment the date for payment of which has not arrived shall be collected at the same time as, and as a part of, such installment. The part of the deficiency so prorated to any installment the date for payment of which has arrived shall be paid upon notice and demand from the Controller. This subdivision shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(f) If the time for payment of any amount of tax has been extended under this section—

(1) Interest payable under Section 14211 on any unpaid portion of such amount attributable to the first five years after the date prescribed by Section 14103 shall be paid annually.

(2) Interest payable under Section 14211 on any unpaid portion of such amount attributable to any period after the 5-year period referred to in paragraph (1) shall be paid annually at the same time as, and as a part of, each installment payment of the tax.

(3) In the case of a deficiency to which subdivision (e) applies which is assessed after the close of the 5-year period referred to in paragraph (1), interest attributable to such 5-year period, and interest assigned under paragraph (2) to any installment the date for payment of which has arrived on or before the date of the assessment of the deficiency, shall be paid upon notice and demand from the Controller.

(4) If the executor has selected a period shorter than five years under paragraph (3) of subdivision (a), such shorter period shall be substituted for five years in paragraphs (1), (2), and (3) of this subdivision.

(g)(1)(A) If—

(i) One-third or more in value of an interest in a closely held business which qualifies under paragraph (1) of subdivision (a) is distributed, sold, exchanged, or otherwise disposed of, or

(ii) Aggregate withdrawals of money and other property from the trade or busines, an interest in which qualifies under paragraph (1) of subdivision (a), made with respect to such interest, equal or exceed one-third of the value of such trade or business,

then the extension of time for payment of tax provided in subdivision (a) shall cease to apply, and any unpaid portion of the tax payable in installments shall be paid upon notice and demand from the Controller.

(B) In the case of a distribution in redemption of stock to which Section 303 of the Internal Revenue Code (or so much of Section 304 of the Internal Revenue Code as relates to Section 303) applies—

(i) Subparagraph (A)(i) does not apply with respect to the stock redeemed; and for purposes of such subparagraph the interest in the closely held business shall be considered to be such interest reduced by the value of the stock redeemed, and

(ii) Subparagraph (A)(ii) does not apply with respect to withdrawals of money and other property distributed; and for purposes of such subparagraph the value of the trade or business shall be considered to be such value reduced by the amount of money and other property distributed.

This subparagraph shall apply only if, on or before the date prescribed by paragraph (3) of subdivision (a) for the payment of the first installment which becomes due after the date of the distribution (or, if earlier, on or before the day which is one year after the date of the distribution), there is paid an amount of the tax imposed by this part not less than the amount of money and other property distributed.

(C) Subparagraph (A)(i) does not apply to an exchange of stock pursuant to a plan of reorganization described in subparagraph (D), (E), or (F) of Section 368(a)(1) of the Internal Revenue Code nor to an exchange to which Section 355 of the Internal Revenue Code (or so much of Section 356 of the Internal Revenue Code as relates to Section 355) applies; but any stock received in such an exchange shall be treated for purposes of subparagraph (A)(i) as an interest qualifying under paragraph (1) of subdivision (a).

(D) Subparagraph (A)(i) does not apply to a transfer of property of the decedent to a person entitled by reason of the decedent's death to receive such property under the decedent's will, the applicable law of descent and distribution, or a trust created by the decedent.

(2)(A) If an election is made under this section and the estate has undistributed net income for any taxable year ending on or after the due date for the first installment, the executor shall, on or before the date prescribed by law for filing the income tax return for such taxable year (including extensions thereof), pay an amount equal to such undistributed net income in liquidation of the unpaid portion of the tax payable in installments.

(B) For purposes of subparagraph (A), the undistributed net income of the estate for any taxable year is the amount by which the distributable net income of the estate for such taxable

year (as defined in Section 643 of the Internal Revenue Code) exceeds the sum of all of the following:

(i) The amounts for such taxable year specified in paragraphs (1) and (2) of Section 661(a) of the Internal Revenue Code (relating to deduction for distributions, etc.).

(ii) The amount of California and federal income taxes imposed for the taxable year on the estate;

(iii) The amount of the tax imposed by this part (including interest) paid by the executor during the taxable year (other than any amount paid pursuant to this paragraph); and

(iv) The amount of federal estate tax (including interest) paid by the executor during the taxable year.

(3) If any installment under this section is not paid on or before the date fixed for its payment by this section (including any extension of time for the payment of such installment), the unpaid portion of the tax payable in installments shall be paid upon notice and demand from the Controller.

(h)(1) If—

(A) A deficiency in the tax imposed by this part is assessed,

(B) The estate qualifies under paragraph (1) of subdivision (a), and

(C) The executor has not made an election under subdivision (a), the executor may elect to pay the deficiency in installments. This subdivision shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(2) An election under this subdivision shall be made not later than 60 days after issuance of notice and demand by the Controller for the payment of the deficiency, and shall be made in such manner as the Controller shall by regulations prescribe.

(3) If an election is made under this subdivision, the deficiency shall (subject to the limitation provided by para-

graph (2) of subdivision (a)) be prorated to the installments which would have been due if an election had been timely made under subdivision (a).

The part of the deficiency so prorated to any installment the date for payment of which would have arrived shall be paid at the time of the making of the election under this subdivision. The portion of the deficiency so prorated to installments the date for payment of which would not have so arrived shall be paid at the time such installments would have been due if such an election had been made.

(i) The Controller shall prescribe such regulations as may be necessary to the application of this section.

SEC. 19. Section 14182 is added to the Revenue and Taxation Code, to read:

14182.

(a) If the value of an interest in a closely held business which is included in determining the market value of the estate of a decedent who was (at the date of his death) a citizen or resident of the United States exceeds either—

(1) Thirty-five percent of the market value of the estate of such decedent, or

(2) Fifty percent of the clear market value of the estate of such decedent, the executor may elect to pay part or all of the tax imposed by this part in two or more (but not exceeding 10) equal installments. Any such election shall be made no later than the time prescribed by Section 14103, and payment shall be made in such manner as the Controller shall by regulations prescribe. If an election under this section is made, the provisions of this chapter shall apply as though the Controller were extending the time for payment of the tax.

(b) The maximum amount of tax which may be paid in installments as provided in this section shall be an amount which bears the same ratio to the tax imposed by this part (reduced by the credits against such tax) as the value of the interest in a closely held business which qualifies under subdivision (a) bears to the market value of the estate.

(c) For purposes of this section, the term "interest in a closely held business" means any of the following:

(1) An interest as a proprietor in a trade or business carried on as a proprietorship.

(2) An interest as a partner in a partnership carrying on a trade or business, if either of the following applies:

(A) Twenty percent or more of the total capital interest in such partnership is included in determining the gross estate of the decedent.

(B) Such partnership had 10 or less partners.

(3) Stock in a corporation carrying on a trade or business, if either of the following applies:

(A) Twenty percent or more in value of the voting stock of such corporation is included in determining the gross estate of the decedent.

(B) Such corporation had 10 or less shareholders.

For purposes of this subdivision, determinations shall be made as of the time immediately before the decedent's death.

(d) For purposes of subdivisions (a), (b), and (h)(1), interests in two or more closely held businesses, with respect to each of which there is included in determining the market value of the decedent's estate more than 50 percent of the total value of each such business, shall be treated as an interest in a single closely held business. For purposes of the 50-percent requirement of the preceding sentence, an interest in a closely held business which represents the surviving spouse's interest in property held by the decedent and the surviving spouse as community property shall be treated as having been included in determining the market value of the decedent's estate.

(e) If an election is made under subdivision (a), the first installment shall be paid on or before the date prescribed by Section 14103 for payment of the tax, and each succeeding installment shall be paid on or before the date which is one year after the date prescribed by this subdivision for payment of the preceding installment.

(f) If an election is made under subdivision (a) to pay any part of the tax imposed by this part in installments and a deficiency has been assessed, the deficiency shall (subject to the limitation provided by subdivision (b)) be prorated to such installments. The part of the deficiency so prorated to any installment the date for payment of which has not arrived shall be collected at the same time as, and as a part of, such installment. The part of the deficiency so prorated to any installment the date for payment of which has arrived shall be paid upon notice and demand from the Controller. This subdivision shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(g) If the time for payment of any amount of tax has been extended under this section, interest payable under Section 14211 on any unpaid portion of such amount shall be paid annually at the same time as, and as part of, each installment payment of the tax. Interest, on that part of a deficiency prorated under this section to any installment the date for payment of which has not arrived, for the period before the date fixed for the last installment preceding the assessment of the deficiency, shall be paid upon notice and demand from the Controller.

(h)(1)(A) If—

(i) Aggregate withdrawals of money and other property from the trade or business, an interest in which qualifies under subdivision (a), made with respect to such interest, equal or exceed 50 percent of the value of such trade or business, or

(ii) Fifty percent or more in value of an interest in a closely held business which qualifies under subdivision (a) is distributed, sold, exchanged, or otherwise disposed of,

then the extension of time for payment of tax provided in this section shall cease to apply, and any unpaid portion of the tax payable in installments shall be paid upon notice and demand from the Controller.

(B) In the case of a distribution in redemption of stock to which Section 303 of the Internal Revenue Code (or so much of Section 304 of the Internal Revenue Code as relates to Section 303) applies—

(i) Subparagraph (A)(i) does not apply with respect to withdrawals of money and other property distributed; and for purposes of such subparagraph the value of the trade or business shall be considered to be such value reduced by the amount of money and other property distributed, and

(ii) Subparagraph (A)(ii) does not apply with respect to the stock redeemed; and for purposes of such subparagraph the interest in the closely held business shall be considered to be such interest reduced by the value of the stock redeemed.

This subparagraph shall apply only if, on or before the date prescribed by subdivision (e) for payment of the first installment which becomes due after the date of the distribution, there is paid an amount of the tax imposed by this part not less than the amount of money and other property distributed.

(C) Subparagraph (A)(ii) does not apply to an exchange of stock pursuant to a plan of reorganization described in subparagraph (D), (E), or (F) of Section 368(a)(1) of the Internal Revenue Code nor to an exchange to which Section 355 of the Internal Revenue Code (or so much of Section 356 of the Internal Revenue Code as relates to Section 355) applies; but any stock received in such an exchange shall be treated for purposes of such subparagraph as an interest qualifying under subdivision (a).

(D) Subparagraph (A)(ii) does not apply to a transfer of property of the decedent by the executor to a person entitled to receive such property under the decedent's will or under the applicable law of descent and distribution.

(2)(A) If an election is made under this section and the estate has undistributed net income for any taxable year after its fourth taxable year, the executor shall, on or before the date

prescribed by law for filing the income tax return for such taxable year (including extensions thereof), pay an amount equal to such undistributed net income in liquidation of the unpaid portion of the tax payable in installments.

(B) For purposes of subparagraph (A), the undistributed net income fo the estate for any taxable year is the amount by which the distributable net income of the estate for such taxable year (as defined in Section 643 of the Internal Revenue Code) exceeds the sum of all of the following:

(i) The amounts for such taxable year specified in paragraphs (1) and (2) of Section 661(a) of the Internal Revenue Code (relating to deduction for distributions, etc.).

(ii) The amount of California and federal income taxes imposed for the taxable year on the estate.

(iii) The amount of the tax imposed by this part (including interest) paid by the executor during the taxable year (other than any amount paid pursuant to this paragraph).

(iv) The amount of federal estate tax (including interest) paid by the executor during the taxable year.

(3) If any installment under this section is not paid on or before the date fixed for its payment by this section (including any extension of time for the payment of such installment), the unpaid portion of the tax payable in installments shall be paid upon notice and demand from the Controller.

(i)(1) If—

(A) A deficiency in the tax imposed by this part is assessed after the date of the enactment of this section, and

(B) The estate qualifies under paragraph (1) or (2) of subdivision (a),

the executor may elect to pay the deficiency in installments. This subdivision shall not apply if the deficiency is due to negligence, to Intentional disregard of rules and regulations, or to fraud with intent to evade tax.

(2) An election under this subdivision shall be made not later than 60 days after the issuance of notice and demand by the Controller for the payment of the deficiency.

(3) If an election is made under this subdivision, the deficiency shall (subject to the limitation provided by subdivision (b)) be prorated to the installments which would have been due if an election had been timely made under this section at the time the estate tax return was filed.

The part of the deficiency so prorated to any installment the date for payment of which would have arrived shall be paid at the time of the making of the election under this subdivision. The portion of the deficiency so prorated to installments the date for payment of which would not have so arrived shall be paid at the time such installments would have been due if such an election had been made.

(j) The Controller shall prescribe such regulations as may be necessary to the application of this section.

SEC. 20. Section 14211 of the Revenue and Taxation Code is amended to read:

14211.

(a) The tax does not bear interest if it is paid prior to the date on which it otherwise becomes delinquent. However, if it is paid after that date it bears interest at the rate of 12 percent per annum from the date it became delinquent and until it is paid or, in the case of any tax being paid in installments pursuant to Section 14105, * * * 14143.5, 14181, or 14182, at the adjusted rate of interest provided in subdivision (b) of this section or at 12 percent per annum, whichever is lower, until the date prescribed for payment of such installment, and thereafter at the rate of 12 percent per annum.

(b) The initial adjusted rate of interest shall be 11 percent per annum. The Controller shall establish an adjusted rate of interest for the purpose of this section not later than October 15 of any year if the adjusted prime rate charged by banks (that being 90 percent of the average predominate rate quoted by

---

deletion by asterisks * * *

commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System) during September of that year, rounded to the nearest full percent, is at least a full percentage point more or less than the adjusted rate of interest which is then in effect. Any such adjusted rate of interest shall be equal to the adjusted prime rate charged by banks, rounded to the nearest full percent, and shall become effective on February 1 of the immediately succeeding year. Any adjustment provided for under this * * * subdivision may not be made prior to the expiration of 23 months following the date of any preceding adjustment under this * * * subdivision which changes the rate of interest.

SEC. 21. Section 14342 of the Revenue and Taxation Code is repealed.

SEC. 22. Section 14343 of the Revenue and Taxation Code is repealed.

SEC. 23. Section 14344 of the Revenue and Taxation Code is repealed.

SEC. 24. Section 14345 of the Revenue and Taxation Code is amended to read:

14345.

No * * * trust company, corporation, bank, other institution, or person in possession, control, custody, partial control, or partial custody of any securities, deposits, or other property, including shares of the capital stock of or other interest in any such organization or institution, belonging to or standing in the name of a decedent, whether resident or nonresident, shall deliver or transfer any such property to or upon the order or request of any executor of the will, administrator of the estate, legatee or heir of the decedent; nor deliver or transfer any such property to or upon the order of any agent, deputy, attorney, trustee or successor in interest of the decedent after receipt of actual notice of the death of the decedent; nor deliver or transfer any securities or other property, including any shares of the capital stock or other interest in any such organization or institution, standing in the joint names of the

---

deletion by asterisks * * *

decedent and one or more other persons, to or upon the order or request of such other person or persons after receipt of actual notice of the death of the decedent; and no bank or other institution having custody of any deposit standing in the joint names of a decedent and any other person or persons or standing in the name of the decedent subject to the right of any other person or persons to draw upon or withdraw the same shall pay or deliver such deposit to or upon the order of such other person or persons after receipt of actual notice of the death of the decedent by the officer or manager in charge of the office or branch of such bank or other institution at which such deposit is carried or by the employee thereof who pays or delivers said deposit:

(a) Without retaining a sufficient portion or amount of the property to pay any tax and interest which may thereafter be assessed pursuant to this part; and

(b) Without first giving notice of the time and place of the delivery or transfer to the Controller and county treasurer at least 10 days prior to the delivery or transfer.

The Controller, or any person authorized in writing by the Controller, may consent in writing to the delivery or transfer, in which event compliance with this section is not required.

The Controller or his or her authorized agent may examine any property specified in this section at the time of its delivery or at any other time.

SEC. 25. Section 14346 of the Revenue and Taxation Code is repealed.

SEC. 26. Section 14347 of the Revenue and Taxation Code is amended to read:

14347.

Any * * * trust company, corporation, bank, other institution, or person required to comply with the provisions of this article but failing to do so is liable to the state for the amount of any tax, interest or penalty due and payable under this part on the transfer of the property involved, if solely by reason of such transfer or payment the state is unable to recover the same.

---

deletion by asterisks * * *

The liabilities imposed by this section may be enforced by the Controller in an action brought in any court of competent jurisdiction.

SEC. 27. Section 14774 of the Revenue and Taxation Code is amended to read:

14774.

For the services performed by him or her pursuant to this part, the inheritance tax referee shall be paid out of the Inheritance Tax * * * Fund:

(a) Such reasonable compensation as the * * * Controller shall fix.

(b) Such actual and necessary traveling and other incidental expenses, including fees paid to witnesses subpoenaed by him or her, as the * * * Controller shall allow.

No payment shall be made unless the claim for payment is first approved by the Controller.

Any payment under this section is in addition to any other payment to the referee pursuant to Section 609 of the Probate Code.

SEC. 28. Section 14791 of the Revenue and Taxation Code is repealed.

SEC. 29. Section 14792 of the Revenue and Taxation Code is repealed.

SEC. 30. Section 14793 of the Revenue and Taxation Code is repealed.

SEC. 31. Section 14794 of the Revenue and Taxation Code is repealed.

SEC. 32. Section 14795 of the Revenue and Taxation Code is repealed.

SEC. 33. Section 14798 of the Revenue and Taxation Code is repealed.

SEC. 34. Section 14902 of the Revenue and Taxation Code is amended to read:

---

deletion by asterisks * * *

14902.

The money in the Inheritance Tax Fund is hereby appropriated as follows:

(a) To pay the refunds authorized by this part and by Part 9.5 (commencing with Section 16700) of this division.

(b) To pay the compensation and expenses of the referee referred to in Section 14774.

(c) the balance of the money in the fund shall, on order of the Controller, be transferred to the State General Fund.

SEC. 35. Section 15104.5 of the Revenue and Taxation Code is repealed.

SEC. 37. Section 15301 of the Revenue and Taxation Code is repealed.

SEC. 38. Section 15301.5 of the Revenue and Taxation Code is repealed.

SEC. 39. Section 15303.5 of the Revenue and Taxation Code is repealed.

SEC. 40. Section 15310 of the Revenue and Taxation Code is amended to read:

15310.

* * * In the case of a transfer to either spouse by the other, none of the property transferred is subject to this part, except that if a limited power of appointment over any portion or all of the donor's property is given to the donor's spouse, the value of such property is subject to this part; provided, however, that the value of any interest, other than the power itself, given to the donor's spouse in such property is not subject to this part.

SEC. 41. Section 15421 of the Revenue and Taxation Code is amended to read:

15421.

Property of the clear market value of * * * forty thousand dollars * * * ($40,000) transferred to a minor child of the donor, and of * * * twenty thousand dollars * * * ($20,000) transferred to any other class A donee, other than the spouse of the donor, is exempt from the tax imposed by this part.

---

deletion by asterisks * * *

SEC. 42. Section 15422 of the Revenue and Taxation Code is amended to read:

15422.

Property of the clear market value of * * * ten thousand dollars * * * ($10,000) transferred to any class B donee is exempt from the tax imposed by this part.

SEC. 43. Section 15423 of the Revenue and Taxation Code is amended to read:

15423.

Property of the clear market value of three * * * thousand dollars * * * ($3,000) transferred to any class C donee is exempt from the tax imposed by this part.

SEC. 45. The sum of four hundred thousand dollars ($400,000) is hereby appropriated to the Controller for the purpose of administering this act.

SEC. 46. This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect. However, the provisions of this act with respect to the computation of inheritance taxes shall apply only to the estates of decedents dying on and after January 1, 1981, and with respect to the computation of gift taxes, shall apply only to gifts made on and after January 1, 1981. All other provisions of this act relating to probate procedure and tax administration and collection, shall apply to all estates, effective January 1, 1981.

Approved July 19, 1980.

Filed July 20, 1980.

---

deletion by asterisks * * *

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1556

In the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA, and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,

Petitioners,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Joint Appendix

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, California 94108
(415) 434-1600
Attorneys for Petitioners
*Counsel of Record

RICK HARRISON*
PATTON G. LOCHRIDGE
McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
(512) 476-6982

DAVID DEADERICK*
GIBBINS, BURROW, WASH & BRATTON
Post Office Box 1452
Austin, Texas 78767
(512) 474-2441
Attorneys for Respondents White & Bullock
*Counsel of Record

[Counsel list continued on inside page]

Petition for Certiorari Filed March 12, 1981
Certiorari Granted June 1, 1981

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

O. CLAYTON LILIENSTERN*
PATRICIA A. STEVENSON
ANDREWS, KURTH, CAMPBELL
& JONES
2500 Exxon Building
Houston, Texas 77002
(713) 652-2412
Attorneys for Respondent William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr., Deceased
*Counsel of Record

REX E. LEE*
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2000
Attorneys for Respondent United States of America
*Counsel of Record

CHARLIE D. DYE
BROWN, MARONEY, ROSE, BAKER
& BARBER
1300 American Bank Tower
211 West Sixth Street
Austin, Texas 78701
(512) 472-5456
Attorneys for Respondent William Rice Lummis, Nevada Co-Special Administrator of the Estate of Howard R. Hughes, Jr., Louisiana Provisional Administrator of the Estate of Howard R. Hughes, Jr., and Delaware Ancillary Administrator of the Estate of Howard R. Hughes, Jr., and First National Bank, Nevada Co-Special Administrator of the Estate of Howard R. Hughes, Jr.
*Counsel of Record

RONALD E. GOTHER*
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, California 90071
(213) 488-7322
Attorneys for Respondent Richard C. Gano, Jr., California General Administrator of the Estate of Howard R. Hughes, Jr.
*Counsel of Record

INDEX[1]

Chronological List of Relevant Docket Entries iii

Complaint, July 14, 1978 1

Motion to Dismiss, filed by Defendants Hill and Bullock, August 3, 1978 14

Defendants Cory's and Alvord's Motion to Add Defendants, August 28, 1978 21

Defendants Cory's and Alvord's Motion for Change of Venue, August 28, 1978 22

Affidavit of Steven L. Mayer in Support of Motion for Change of Venue, August 28, 1978 (excerpted) 24

Inter-heir Settlement Agreements (Exhibits F to the Affidavit of Steven L. Mayer in support of Motion for Change of Venue, August 28, 1978 (excerpted)) 25, 30

Testimony of Clay Lilienstern at the hearing on Defendants Cory's and Alvord's Motions to Add Defendants and Change Venue, November 21, 1978 35

---

1. The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear as appendices in the printed Appendix to Petition for Certiorari:

District Court Order granting Defendants' Motions to Dismiss, dated July 27, 1979 ..... Pet. App. D

District Court's Revised Order denying Defendants Cory's and Alvord's Motion to Add Defendants, dated August 8, 1979 ..... Pet. App. E

District Court's Revised Order denying Defendants Cory's and Alvord's Motion for Change of Venue, dated August 8, 1979 ..... Pet. App. F

District Court's Order dismissing action as to all parties and claims, dated August 20, 1979 ..... Pet. App. G

District Court's Judgment, dated August 20, 1979 ..... Pet. App. H

Opinion of the Court of Appeals for the Fifth Circuit, dated October 27, 1980 ..... Pet. App. A

Order of the Court of Appeals for the Fifth Circuit denying Petition for Rehearing, dated December 12, 1980 ..... Pet. App. B

Order of the United States Court of Appeals for the Fifth Circuit denying Petitioners' Motion for Leave to File Petition for Rehearing Out of Time, dated January 23, 1981 ..... Pet. App. C

INDEX (Cont)

Plaintiffs' First Amended Complaint, May 11, 1979 50

Plaintiffs' Request of Defendant Bullock for Admission of Facts Pursuant to Rule 36, Federal Rules of Civil Procedure, May 18, 1979 70

Plaintiffs' Request of Defendant White for Admission of Facts Pursuant to Rule 36, Federal Rules of Civil Procedure, May 18, 1979.... 73

Defendants Cory's and Alvord's Motion to Dismiss Plaintiffs' First Amended Complaint, June 4, 1979 76

Defendant White's Response to Plaintiffs' Request for Admission of Facts, June 18, 1979 79

Defendant Bullock's Response to Plaintiffs' Request for Admission of Facts, June 18, 1979 82

Responses by Defendant Cory to Plaintiffs' Requests for Admissions, June 20, 1979 85

Responses by Defendant Alvord to Plaintiffs' Requests for Admissions, June 20, 1979 92

Answer of William Rice Lummis and First National Bank of Nevada, Nevada Co-Special Administrators of the Estate of Howard R. Hughes, Jr., Deceased, July 9, 1979 98

Answer of William Rice Lummis, Louisiana Provisional Administrator of the Estate of Howard R. Hughes, Jr., Deceased, July 9, 1979 103

Answer of William Rice Lummis, Delaware Ancillary Administrator of the Estate of Howard R. Hughes, Jr., Deceased, July 9, 1979 108

Answer of Richard Gano, California General Administrator of the Estate of Howard R. Hughes, Jr., Deceased, July 9, 1979 113

Testimony of William Rice Lummis, at the hearing of Defendants' Motions to Dismiss and Plaintiffs' Motion for Preliminary Injunction, July 10, 1979 118

Affidavit of Bert W. Pluyman in support of Motion for Dismissal, July 10, 1979 139

Request for Judicial Notice, filed February 28, 1980 141

Motion for Stay of Mandate Pending Application for Certiorari, December 18, 1980 145

Order Granting Motion for Stay of Mandate, December 31, 1980.... 146

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

7/14/78	Complaint and Application for Temporary Restraining Order filed by Plaintiffs
7/20/78	Temporary Restraining Order issued by District Court
8/ 3/78	Motion to Dismiss filed by Defendants Hill and Bullock
8/28/78	Motion to Add Defendants and Motion for Change of Venue filed by Defendants Cory and Alvord
11/27/78	District Court denies Motions to Change Venue and Add Defendants
12/ 4/78	District Court issues revised Orders denying Motions to Add Defendants and Change Venue
2/12/79	Motion to Dismiss filed by Defendants Cory and Alvord
5/11/79	First Amended Complaint filed by Plaintiffs
5/14/79	Motion for Preliminary Injunction filed by Plaintiffs
5/16/79	Court enters Order Dismissing California Attorney General
5/31/79	Motion to Dismiss First Amended Complaints filed by Defendants Cory and Alvord
7/10/79	Hearing on Defendants' Motions to Dismiss and Plaintiffs' Motion for Preliminary Injunction
7/27/79	District Court enters Order dismissing interpleader action and granting Motion to Dismiss
8/ 8/79	District Court issues revised Orders denying Defendants Cory's and Alvord's Motions to Add Defendants and Change Venue containing certification under 28 U.S.C. § 1292(b)
8/ 9/79	Notice of Appeal filed by Plaintiffs
8/ 9/79	Notice of Cross-Appeal filed by Defendants Cory and Alvord
8/20/79	District Court enters Order dismissing action and Judgment in favor of Defendants
8/20/79	Amended Notice of Appeal filed by Plaintiff
8/20/79	Amended Notice of Cross-Appeal filed by Defendants Cory and Alvord
8/27/79	Fifth Circuit grants Motion for Injunction Pending Appeal filed by Plaintiffs
3/31/80	Oral Argument on Appeal in Fifth Circuit
10/27/80	Fifth Circuit reverses District Court finding of lack of jurisdiction and affirms District Court rulings on Motions to Add Defendants and Change Venue
11/24/80	Petition for Rehearing en Banc filed by Defendants Cory and Alvord
12/12/80	Petition for Rehearing en Banc denied
1/15/81	Motion for Leave to File Petition for Rehearing Out-of-Time filed by Defendants Cory and Alvord
1/23/81	Motion for Leave to File Petition for Rehearing Out-of-Time denied by Fifth Circuit

Appendix

Filed July 14, 1978

In the United States District Court
for the Western District of Texas

Austin Division

Civil Action No.

A 78 CA 148

WILLIAM RICE LUMMIS, and
ANNETTE GANO LUMMIS,
Texas Temporary Co-Administrators of the Estate of Howard R. Hughes, Jr., Deceased,

Plaintiffs,

vs.

JOHN HILL, Attorney General of the State of Texas,
BOB BULLOCK, Comptroller of the State of Texas,
EVELLE J. YOUNGER, Attorney General of the State of California,

KENNETH CORY, Controller of the State of California and as Agent of the County of Los Angeles, California,
H. B. ALVORD, County Treasurer for the County of Los Angeles,

WILLIAM RICE LUMMIS, and
FIRST NATIONAL BANK OF NEVADA
Nevada Co-Special Administrators of the Estate of Howard R. Hughes, Jr., Deceased, and

RICHARD GANO
California Special Administrator of the Estate of Howard R. Hughes, Jr., Deceased,

Defendants.

COMPLAINT

Nature of the Action

1. This is an action in the nature of interpleader, including declaratory and injunctive relief.

Parties

2. Plaintiff Annette Gano Lummis is a citizen of the State of Texas ("Texas"), and Plaintiff William Rice Lummis is a citizen of the State of Nevada ("Nevada"); both are the Texas temporary co-administrators of the estate of Howard R. Hughes, Jr., deceased ("Texas Administrators") in proceedings pending in Probate Court No. 2 of Harris County, Texas.

3. The assets comprising the estates which are the subject of the several probate proceedings referred to herein are hereafter collectively referred to as "the Estate".

4. Defendant John Hill is the duly elected, qualified and acting Attorney General of Texas. Defendant Bob Bullock is the duly elected, qualified and acting Comptroller of Texas. Each official is a citizen of Texas; and each is charged by law with the duty of enforcing the inheritance tax laws of Texas.

5. Defendant Hill's business address is Supreme Court Building, Austin, Texas. His residence address is 2528 Tanglewood Trail, Austin, Texas.

6. Defendant Bullock's business address is 111 East Seventh Street, Austin, Texas. His residence address is 8301 Balcones Drive, Austin, Texas.

7. Defendant Evelle J. Younger is the duly elected, qualified and acting Attorney General of The State of California ("California"). Defendant Kenneth Cory is the duly elected, qualified and acting Controller of California. Each official is a citizen of California; and each is charged by law with the duty of enforcing the inheritance tax laws of California. Defendant Cory also acts in a representative capacity as Agent of the County of Los Angeles. Said county is a citizen of California. Defendant H. B. Alvord is a citizen of California; and is the duly qualified and acting County Treasurer for the County of Los Angeles.

8. Defendant Younger's business address is 555 Capitol Mall, Suite 550, Sacramento, California. His residence address is unknown to Plaintiffs, but is located in California.

9. Defendant Cory's business address is Division of Inheritance and Gift Tax, 1227 O Street, Sacramento, California. His residence address is unknown to Plaintiffs, but is located in California.

10. Defendant Alvord's business address is 500 West Temple Street, Room 137, Los Angeles, California. His residence address is unknown to Plaintiffs, but is located in California.

11. Defendants William Rice Lummis and the First National Bank of Nevada are the co-special administrators of the estate in Nevada ("Nevada Administrators"). Defendant First National Bank of Nevada is a national banking association located and having a principal place of business in Nevada; and is a citizen of Nevada pursuant to 28 U.S.C. § 1348. The business address of Defendant Lummis is Summa Corporation, P. O. Box 14000, Las Vegas, Nevada 89156. His residence address is Sands Hotel, Las Vegas, Nevada 89102. The address of Defendant First National Bank of Nevada is P. O. Box 160, 302 E. Carson Avenue, Las Vegas, Nevada 89101.

12. Defendant Richard Gano is a citizen of California; and is the special administrator of the estate in California ("California Administrator"). His address is 2214 E. Sycamore Street, Anaheim, California 92806.

Jurisdiction

13. Jurisdiction over the parties and subject matter is conferred upon this Court by:

(a) THE FEDERAL INTERPLEADER ACT, 28 U.S.C. § 1335, in that:

(i) the Defendants Hill and Bullock, citizens of Texas, are claiming that Decedent was a Texas domiciliary, adverse to the claim of Defendants Younger, Cory and Alvord, citizens of California, that Decedent was a California domiciliary.

(ii) Defendant Richard Gano, the California Administrator and a citizen of California, claims that Decedent was domiciled in Nevada at the time of death, adverse to the claims of Defendants Hill and Bullock, citizens of Texas, that Decedent was domiciled in Texas at the time of his death. Defendant Gano, as California Special Administrator, may be compelled to assert claims adverse to the Nevada Administrators, and Plaintiffs as well.

(iii) Defendants First National Bank of Nevada and William Rice Lummis, the Nevada Administrators, are claiming that Decedent was domiciled in Nevada at the time of his death, adverse to both the claim of Defendants Hill and Bullock, citizens of Texas, that Decedent was domiciled in Texas at the time of his death, and the claim of Defendants Younger, Cory and Alvord, citizens of California, that Decedent was domiciled in California at the time of his death.

(iv) Plaintiffs William Rice Lummis and Annette Gano Lummis, the Texas Administrators, are claiming that Decedent was domiciled in Nevada at the time of his death, adverse to both the claim of Defendants Hill and Bullock, citizens of Texas, that Decedent was domiciled in Texas at the time of his death and the claim of Defendants Younger, Cory and Alvord, citizens of California, that Decedent was domiciled in California at the time of his death.

(v) The amount in controversy exceeds the value of $500.00.

(b) 28 U.S.C. § 1331 in that this is an action arising under the Constitution and laws of the United States and the amount in controversy exceeds the value of $10,000.00 exclusive of interest and costs.

(c) 28 U.S.C. § 1343(3) in that this is an action to redress the deprivation of valuable property rights, now and in the future, under color of either Texas or California law, or the laws of both states, without according the Plaintiffs due proceess of law and equal protection of the law.

Venue

14. Venue is laid in this District by 28 U.S.C. § 1397.

Background

15. Howard R. Hughes, Jr. ("Decedent") died on April 5, 1976. On April 14, 1976, nine days after the death of Decedent, probate proceedings were initiated in the state courts of Texas, Nevada and California.

16. California and Texas each maintains, and has maintained at all relevant times herein, a system of death taxation whereby statutory liens on the right of succession are imposed on real and tangible personal property located within its borders; and on the intangible personality, wherever situated, of a person domiciled within that particular state. The responsible authorities in each State, including Defendants Hill and Bullock in Texas and Defendants Younger, Cory and Alvord in California, are claiming that Decedent was domiciled therein at the time of his death and have taken steps to impose a tax on all the assets of the Estate within their taxing jurisdiction, including intangibles, which embrace almost the entire value of the Estate. Additionally, Defendants Younger, Cory and Alvord are claiming that a part of the Estate is subject to California death taxation on the ground that Decedent was domiciled without the United States at the time of his death. Plaintiffs deny these conflicting claims of domicile and assert that Decedent was a domiciliary of Nevada at the time of his death.

17. The law of both Texas and California recognizes that for death tax purposes a decedent has only one domicile at time of death; and, if domicile within the taxing jurisdiction is the asserted ground for taxation, that only the domiciliary state has a lawful right to tax the Decedent's intangibles.

18. On June 10, 1976, Texas filed an appearance in the Texas probate proceedings, contending, *inter alia,* that Decedent was a

Texas domiciliary at the time of his death and asserting its statutory death tax lien against all assets subject to Texas jurisdiction, including intangibles wherever located. On April 10, 1978, a judgment was entered in the Texas probate court that Decedent was a Texas domiciliary at the time of his death. That judgment is being appealed by the Texas administrators in the Texas appellate courts and therefore is not yet final and conclusive. California is not a party to and therefore takes the position that it will not be bound by any judgment entered in the Texas proceedings.

19. California death tax proceedings began with the appointment by the Superior Court, Los Angeles County, of an Inheritance Tax Referee to inventory and appraise the Estate subject to California jurisdiction. On August 24, 1977, the California Administrator submitted the California Inheritance Tax Declaration to the Referee. The California Administrator's Declaration asserted that Decedent was a Nevada domiciliary and reported only tangible personal and real property located in California. The Inheritance Tax Referee has advised that he intends to file a report stating that there is now due a California death tax on the entire Estate, less the real and tangible personal property located outside of California, on the basis that Decedent was domiciled in either California or outside of the United States at the time of death. Notice of the filing of the Report will be sent as required by law to all known persons potentially liable for the tax. Objections to the Report based, *inter alia,* on the claim of Nevada domicile, will be filed by the California Administrator, who will continue to maintain that Decedent was a Nevada domiciliary at the time of his death. The question of Decedent's domicile is therefore an issue in the California proceedings. Texas is not a party to and therefore takes the position that it will not be bound by any judgment entered in the California proceedings.

20. Legal action involving the Estate is also pending in the following jurisdictions:

(a) Nevada. Application to probate the so-called "Mormon Will" was filed in Nevada state court on April 30, 1976 by Noah Dietrich, as executor, and a contest to that application was filed by Annette Gano Lummis in her individual capacity on May 6, 1976. On June 23, 1976 Texas filed a Motion to Dismiss for Want of Jurisdiction and Contest and Opposition to Probate in the will contest proceedings in Nevada, contending that Decedent was a Texas domiciliary at the time of his death and asking the Nevada court to stay its proceedings pending the outcome of the Texas proceedings. On August 27, 1976 the Nevada court denied Texas' Motion and ordered that the validity of the so-called "Mormon Will" be tried before a determination on the issue of domicile. The ensuing "Mormon Will" trial lasted some seven months. A judgment decreeing the will to be invalid was entered on June 23, 1978. The issue of domicile is still pending in the Nevada administration. Although Texas appeared in the Nevada proceedings, it now disclaims that such appearance was a general appearance and asserts that it therefore will not be bound by the Nevada domicile proceeding. California has made no appearance in the Nevada proceeding and therefore takes the position that it will not be bound by a determination as to domicile in that proceeding.

(b) Delaware. On May 4, 1976, Summa Corporation, a Delaware corporation wholly owned by Decedent, instituted an interpleader action in the Chancery Court of New Castle County, Delaware, initially seeking a determination as to the ownership of its outstanding shares. Later the petition was amended so that the relief sought was a direction from the court as to the proper domiciliary administration to whom the shares should be remitted on termination of administration. The Delaware Chancery Court has entered an order requiring Summa until further order to recognize William Rice Lummis, as ancillary administrator of the Estate in Delaware, as the sole shareholder of Summa. California

did not appear therein; it therefore takes the position that it will not be bound by any judgment entered in the Delaware proceeding. Texas appeared in the Delaware proceeding, but is seeking a dismissal of the action to it and disclaims that its appearance was a general appearance. Accordingly, Texas contends that it will not be bound by any judgment entered therein.

21. On November 11, 1977, California sought leave of the United States Supreme Court to file with that Court a Complaint against Texas, seeking, *inter alia,* that the Court declare that Decedent was not a Texas domiciliary at the time of his death. On June 22, 1978 the Court denied, *per curiam,* the California Motion. A copy of the order of the Court, including the three opinions by the four Justices concurring therein, is attached to this Complaint as "Exhibit A".

22. In view of (i) the continuing failure or unwillingness of both Texas and California to submit to the jurisdiction of each other's courts, and to the jurisdiction of courts in other states, and (ii) the refusal of the United States Supreme Court to grant leave to California to file a complaint with the Court against Texas, Plaintiffs in the case at bar allege a federal district court with interpleader jurisdiction, such as this Court, provides the only readily available forum wherein an adjudication of the domicile of Decedent binding upon all indispensable parties can be made, with respect to all of the assets of the Estate.

Interpleader

23. As a result of the facts hereinabove alleged Plaintiffs are faced with the assertion of conflicting claims of domicile and death taxes and a consequent substantial risk of loss that the courts of Texas and California will each separately determine Decedent to have been a domiciliary of different jurisdictions, contrary to the law of each state which recognizes that a decedent can be domiciled in only one jurisdiction at the time of death and the claim of Plaintiffs that Decedent was a Nevada domiciliary at the time of his death.

24. Plaintiffs allege that, in this event, the Estate would be insufficient to discharge the aggregate tax assessments claimed by Texas (roughly 16%), California (roughly 24%) and the United States (roughly 77% minus a 16% state tax credit, or 61%), assessments which would result in a total tax rate of 101% of the Estate.

25. Because California law does not permit certain deductions from the gross estate which are allowable for Federal estate tax purposes, California's real rate of taxation significantly exceeds its nominal 24% rate. Thus, should California and Texas each determine that Decedent was a domiciliary of its respective state, the Estate would be subject to an effective death tax rate well in excess of 101% of the net federal taxable estate.

26. Plaintiffs have no plain, speedy or efficient remedy in the state courts of either Texas or California.

27. On the other hand, the law has now developed so that Federal Interpleader in a proper United States District Court is now available, offers an effective remedy to prevent multiple death taxes on intangibles where the multiple taxes are based on a single domicile, as here, and hence only one state may legally levy and collect the tax. In equity and good conscience the remedy should now be used to prevent illegal multiple state taxation that is arbitrary, confiscatory and violates the due process clause of the Fourteenth Amendment.

28. Plaintiffs, as administrators, claim no beneficial interest in the Estate.

29. Property and funds being administered by Plaintiffs and the Defendant Administrators are held by them in their fiduciary capacities and subject to the jurisdiction and control of the probate courts referred to above. Accordingly, they cannot deposit said property and funds with this Court. Plaintiffs will abide the judgment of this Court respecting the conflicting claims which are the subject hereof, and are prepared to give such bond to the Clerk of

this Court as the Court may deem proper. Plaintiffs further allege, in this regard, that because their conduct, and that of the Defendant Administrators, with respect to the property and funds within their control, is subject to fiduciary standards and judicial control by the various probate courts, a bond in a nominal amount will protect the legitimate interests of the remaining Defendants.

COUNT I.

30. Plaintiffs reallege the allegations contained in Paragraphs 1-29 above.

31. Plaintiffs allege that the acts of Defendants Hill and Bullock, purportedly on behalf of Texas, as hereinabove alleged, and the acts of Defendants Younger and Cory, purportedly on behalf of California and the acts of Defendants Cory and Alvord, purportedly on behalf of the County of Los Angeles, as alleged hereinabove, are in fact and in law wholly without any valid legal authority for the reasons that Decedent was a Nevada domiciliary at the time of his death, could not therefore have been a domiciliary of any other jurisdiction, and under the inheritance laws of each of those states, the imposition of death taxes could not be lawfully made.

32. Plaintiffs allege that Defendants Hill and Bullock and Defendants Younger, Cory and Alvord are tort-feasors in that they have been and are now acting without legal warrant.

COUNT II.

33. Plaintiffs reallege the allegations contained in Paragraphs 1-29 above.

34. Plaintiffs allege that even if Decedent was not domiciled in Nevada at the time of his death, nevertheless, the acts of Defendant Hill and Defendant Bullock, and each of them, purportedly on behalf of the State of Texas, as hereinabove alleged, constitute a denial of due process of law for the reason that while the law of each of the States of Texas and California recognizes

that a decedent has but one domicile for purposes of death taxes, the proceedings in neither State can protect the Estate from having to pay the same obligation twice, if it must be paid at all.

COUNT III.

35. Plaintiffs reallege the allegations contained in Paragraphs 1-29 above.

36. Plaintiffs allege that even if Decedent was not domiciled in Nevada at the time of his death, nevertheless, the acts of Defendant Younger and Defendant Cory, and each of them, purportedly on behalf of the State of California, as hereinabove alleged, and Defendant Cory and Defendant Alvord, and each of them, purportedly on behalf of the County of Los Angeles, as hereinabove alleged, constitute a denial of due process of law for the reason that while the law of each of the States of Texas and California recognizes that a decedent has but one domicile for purposes of death taxes, the proceedings in neither State can protect the Estate from having to pay the same obligation twice, if it must be paid at all.

COUNT IV.

37. Plaintiffs reallege the allegations contained in Paragraphs 1-29 above.

38. Plaintiffs allege that only a federal district court with interpleader jurisdiction, such as this Court, can provide a plain, speedy and efficient forum securing the presence of parties indispensable to this action, with respect to all of the assets of the Estate, the absence of which constitutes a denial of due process of law.

39. Accordingly, the Defendants Hill, Bullock, Younger, Cory and Alvord, and each of them, should be enjoined from the depriving of Plaintiffs, under color of state law, of valuable property rights without according the Plaintiffs both due process of law, by

proceeding in a forum which cannot afford jurisdiction over all indispensable parties, and equal protection of the law.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully demand that this Court:

1. Require that Defendants be cited pursuant to 28 U.S.C. § 2361, in order to interplead their claims against the Estate in this action as against the claim of the Plaintiffs that Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death.

2. Adjudge and declare that Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death.

3. Adjudge and declare that Plaintiffs are not liable to either Texas or California for death taxes levied on intangibles of Plaintiff's Estate and that Defendants Hill, Bullock, Younger, Cory and Alvord are acting without any legal warrant and will continue so to act unless restrained by this court.

4. Restrain and enjoin the Defendants Hill, Bullock, Younger, Cory and Alvord and their agents from instituting, prosecuting, or continuing any proceeding in any State or United States Court affecting the properties, instrument or obligation involved in this action until further order of this court.

5. Grant Plaintiffs all other and further relief, including its costs and attorneys' fees, to which entitlement is shown.

Respectfully submitted,

R. JAMES GEORGE, JR.
Attorney of Record for
Plaintiffs William Rice Lummis,
and Annette Gano Lummis

GRAVES, DOUGHERTY, HEARON, MOODY & GARWOOD
2300 Austin National Bank Tower
Box 98
Austin, Texas 78767
(512) — 478-6421

Of Counsel for Plaintiffs:
ANDREWS, KURTH, CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002
(713) — 652-2500

Professor James Wm. Moore
54 Meadow Street
New Haven, Connecticut 06506

(Exhibits Omitted in Printing)

Filed August 3, 1978

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME John L. Hill, Attorney General of Texas, and Bob Bullock, Comptroller of Texas, Defendants in the above numbered and entitled cause, and file this their Motion to Dismiss. In support thereof, Defendants would respectfully show this honorable Court the following:

I.

The federal courts of the United States, specifically including this Court, lack jurisdiction over the parties and the subject matter of this action.

II.

The Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

III.

This action brought against the Attorney General and the Comptroller of the State of Texas is in fact and substance a suit against the State of Texas and is forbidden by the Eleventh Amendment to the United States Constitution. A time-tested unanimous United States Supreme Court decision so holds. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).

IV.

This action brought against the Attorney General and the Comptroller of the State of Texas is in fact and substance a suit against the State of Texas. The State of Texas as a sovereign State of the United States is immune from suit by the Plaintiffs and has not given its consent to be sued.

V.

The judicial power of the federal courts under Article III, Section 2, of the United States Constitution does not extend to this action. No question is presented which arises under the Constitution or laws of the United States. In addition, this suit is not between citizens of different States, but is in fact and substance a suit between the Plaintiffs and the States of Texas and California, neither of which is a citizen of itself.

VI.

Plaintiffs' Complaint presents no question arising under the Constitution or laws of the United States.

VII.

Defendants' action on behalf of the State of Texas in attempting to collect a domicile-based inheritance tax with respect to the estate of Howard R. Hughes, Jr., pursuant to the provisions of constitutional state inheritance tax statutes, is lawful and constitutional in every respect.

VIII.

This suit is not between citizens of different States.

IX.

Plaintiffs' real complaint is that both the State of Texas and the State of California can levy a tax with respect to the estate of Howard R. Hughes, Jr. Although such an occurrence is quite un-

likely, no constitutional question is presented thereby because the United States Constitution permits both States to impose an inheritance tax with respect to an estate.

X.

This Court does not have jurisdiction over the parties or the subject matter under 28 U.S.C. §1335 for the following reasons, among others:

(a) There are not "two or more adverse claimants" in this action as required by 28 U.S.C. §1335(a)(1). The only claimants in this action within the scope of §1335 are the States of Texas and California and their respective claims are not adverse to each other;

(b) There is not "diverse citizenship" between claimants as required by 28 U.S.C. §1335(a)(1) and as defined in 28 U.S.C. §1332. The only claimants in this action within the scope of §1335 are the States of Texas and California and these States are not citizens of themselves; and

(c) There are not two or more claimants to the same money or property as required by 28 U.S.C. §1335(a)(1). Moreover, the Plaintiffs have not deposited the money or property which they consider to be in controversy into the registry of the Court, nor have they given sufficient bond payable to the Clerk of the Court to insure their ability to comply with the judgment of the Court.

XI.

If 28 U.S.C. §1335 is applicable to the present case, then said statute violates the Tenth Amendment to the United States Constitution in that the Congress of the United States was not given the power in Article I, Section 8, of the United States Constitution to legislate with respect to the probate of decedents' estates or the collection of State inheritance taxes.

XII.

This suit is prohibited by the Tax Injunction Act, 28 U.S.C. §1341, because the Complaint in part requests a United States District Court to enjoin the assessment, levy and collection of a tax under State law where a plain, speedy and efficient remedy may be had in State courts. The courts of California are quite unlikely to sanction the tax claim of the State of California, and therefore the California state court system provides the estate with an adequate means of eliminating the possibility of double taxation.

XIII.

Plaintiffs have failed to exhaust available state judicial remedies and therefore at this time cannot resort to this Court for relief. Both the State of California and the State of Texas provide recourse to their respective judicial systems for a challenge to inheritance tax liability asserted by each State. The courts of each State must be permitted to resolve issues of local tax law without interference from the federal judiciary. If the denial of any federal right is alleged, the final judgments of the state courts will be reviewable by the United States Supreme Court.

XIV.

On April 10, 1978, the Honorable Pat Gregory, Judge of Probate Court No. 2 of Harris County, Texas, issued a Final Judgment Determining Domicile And Denying Probate Of Alleged March 19, 1968 Will in Cause No. 139,362 styled *In re: Estate of Howard Robard Hughes, Jr., Deceased.* A certified copy of said judgment is attached hereto as Exhibit "A" and is incorporated herein for all purposes as if the same were set out verbatim herein. That judgment, based upon a jury verdict rendered on February 15, 1978, is to the effect, in pertinent part, that the State of Texas was the domicile of Howard R. Hughes, Jr., for all purposes at the time of his death on April 5, 1976. The judgment further recites

the numerous persons and entities who made an appearance in that cause and were parties to the proceedings. Only William Rice Lummis and Annette Gano Lummis as Co-Temporary Administrators of decedent's estate (and possibly the Howard Hughes Medical Institute) perfected an appeal from said judgment. As to all other parties who subjected themselves to the jurisdiction of said State court, specifically including all known heirs of Howard Robard Hughes, Jr., the judgment with respect to Texas domicile became final prior to the institution of the present action in this court due to their failure to appeal. Therefore, this judgment must be given full faith and credit as to such non-appealing parties by this Court pursuant to 28 U.S.C. §1738 and the doctrine of res judicata given full force and effect.

XV.

Pursuant to TEX. TAX.—GEN. ANN. art. 14.18 (1969), all the heirs of Howard Robard Hughes, Jr., are personally liable for the Texas inheritance tax. These heirs as non-appealing parties to the foregoing judgment rendered in Probate Court No. 2 of Harris County, Texas, are forever bound to the determination entered therein that Howard Robard Hughes, Jr., was a domiciliary of the State of Texas at the time of his death for the purpose of determining the extent of said Decedent's Estate subject to inheritance tax pursuant to Chapter 14, Title 122A, Texas Taxation—General. (Exhibit A at page 1). In addition, every sister State court pursuant to the Full Faith and Credit Clause of the United States Constitution (Article 4, Section 1) and every federal court pursuant to 28 U.S.C. § 1738 is required to give full faith and credit to that judgment against said heirs. Consequently, the State of Texas can always collect its inheritance tax with respect to the estate of Howard Robard Hughes, Jr., on the basis that Mr. Hughes was a domiciliary of Texas by virtue of its enforceable judgment against the heirs. Therefore, any question presented here

as to whether the State of Texas can lawfully collect its inheritance tax on the basis of Texas domicile is moot. In addition, as to the State of Texas, the Complaint herein fails to state a claim upon which relief can be granted and requests an advisory opinion of this Court.

XVI.

Assuming *arguendo* that this Court has jurisdiction of this action, and that a federal question is presented, the Court should abstain from exercising its jurisdiction to avoid needless, egregious conflict with the State of Texas in a probate and tax matter by permitting domicile litigation to proceed to conclusion in the California state courts. Should the State of California not prevail in its own state courts, a result which is highly likely, then the present action would evaporate. When the State of Texas has in good faith litigated the matter to conclusion in its own state courts, this federal court in the interest of comity should require no less of California when that will very likely be dispositive of these proceedings. Such a course of action is particularly mandated in this case where California has done nothing in its own state courts to assess a tax and where its only judicial action has been to request permission of the United States Supreme Court to file a Complaint against the State of Texas, seeking only that the Court declare the decedent not to be a domiciliary of the State of Texas at the time of his death. Significantly, that sole judicial action was taken pursuant to two agreements between the State of California and the Plaintiffs herein, attached hereto as Exhibits "B" and "C", whereby California would recover 18% of the estate of decedent even if the Court declared him to be a domiciliary of the State of Nevada, and whereby California would obtain 2% of the estate even if that Court declared decedent to be a domiciliary of the State of Texas at the time of his death.

XVII.

Defendants respectfully reserve the right to answer on the merits should this honorable Court rule adversely to Defendants on their Motion to Dismiss.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that this suit be dismissed and that all costs be taxed against the Plaintiffs.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

.....

DAVID M. KENDALL
First Assistant Attorney General

DAVID DEADERICK
Assistant Attorney General

BERT W. PLUYMEN
Assistant Attorney General

Attorneys for Defendants

P. O. Box 12548, Capitol Station
Austin, Texas 78711

(Exhibits and Certificate of Service Omitted in Printing)

Filed August 28, 1978

In the United States District Court
for the Western District of Texas

Austin Division

[Title Omitted in Printing]

DEFENDANTS CORY'S AND ALVORD'S MOTION TO ADD DEFENDANTS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Cory and Alvord and, pursuant to Rules 19 and 20 of the Federal Rules of Civil Procedure, file this motion to compel the Plaintiffs to amend their complaint to add certain persons as Defendants:

I.

The above-named Defendants respectfully move this court for an order (1) making all of the heirs at law of Howard Hughes parties to this action as defendants; (2) directing that process be issued and served upon such heirs; (3) and requiring Plaintiffs to serve and file an amended complaint naming such heirs as Defendants.

II.

A Memorandum of Points and Authorities in support of this motion is filed herewith.

WHEREFORE, PREMISES CONSIDERED, the Defendants Cory and Alvord respectfully pray that the heirs at law of Howard Hughes be made defendants in this action.

Respectfully submitted,

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street
Suite 2900
San Francisco, California 94108

DONALD S. THOMAS
CLARK, THOMAS, WINTERS & SHAPIRO
1200 Capital National Bank Bldg.
Post Office Box 1148
Austin, Texas 78767

By: DONALD S. THOMAS
Attorneys for Defendants
Cory and Alvord

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, CA 90012

[Certificate of Service Omitted in Printing]

Filed August 28, 1978

In the United States District Court
for the
Western District of Texas
Austin Division

[Title Omitted in Printing]

DEFENDANTS CORY'S AND ALVORD'S MOTION FOR CHANGE OF VENUE

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Cory and Alvord, pursuant to 28 U.S.C. § 1404(a), and file this motion for a change of venue from the Western District of Texas:

I.

The above-named Defendants respectfully move this Court to transfer this action to the United States District Court for the District of Colorado.

II.

In the alternative, the above-named Defendants respectfully move this Court to transfer this action to the Central District of California.

III.

A Memorandum of Points and Authorities in support of this motion is filed herewith.

WHEREFORE, PREMISES CONSIDERED, the Defendants Cory and Alvord respectfully pray that this action be transferred to The District of Colorado or, in the alternative, to the Central District of California.

Respectfully submitted,

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE,
NEMEROVSKI, CANADY &
POLLAK
A Professional Corporation
650 California Street
Suite 2900
San Francisco, California 94108

DONALD S. THOMAS
CLARK, THOMAS, WINTERS &
SHAPIRO
1200 Capital National Bank Bldg.
Post Office Box 1148
Austin, Texas 78767

By: DONALD S. THOMAS
Attorneys for Defendants
Cory and Alvord

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, CA 90012

[Certificate of Service Omitted in Printing]

Filed August 28, 1978

In the United States District Court
for the
Western District of Texas
Austin Division

[Title Omitted in Printing]

AFFIDAVIT OF STEVEN L. MAYER IN SUPPORT OF MOTION FOR CHANGE OF VENUE

I, Steven L. Mayer, being first duly sworn, depose and say:

1. I am a member of the State Bar of California and the United States District Court for the Northern District of California, and am one of the attorneys for defendants Cory and Alvord in the above entitled action. If called upon to do so, I could competently testify of my own personal knowledge to the facts set forth herein, except as otherwise indicated.

* * *

11. The known heirs to the Hughes estate have entered into a series of settlement agreements, which purport to distribute the estate to the heirs in specified percentages, irrespective of the state ultimately found to be Mr. Hughes' domicile. Attached hereto as Exhibit F-1 is a true and correct copy of the original Settlement Agreement reached between the heirs in 1976; and Exhibit F-2 attached hereto is a true and correct copy of the Supplemental Agreement signed in 1977. Attached to the agreements are true copies of the notarized signatures of the heirs which, assuming the heirs signed the agreement in their states of residence, indicates their geographical distribution. It can be seen that, as of the date of the recent Supplemental Agreement, the heirs resided in Ohio, Massachusetts, Colorado, Texas and Florida. A list of the heirs which shows the date and place they signed the Supplemental Agreement is attached hereto as Exhibit G. In addition, I have been informed by members of the firm of Andrews, Kurth, Camp-

bell and Jones, counsel for plaintiffs herein, that at least one heir presently resides in the District of Colorado.[2]

* * *

[jurat omitted in printing]

EXHIBIT F

Exhibit F to the Affidavit of Steven L. Mayer
in Support of Motion for Change of Venue, filed August 28, 1978

SETTLEMENT AGREEMENT

THIS AGREEMENT ("Settlement Agreement") is entered into on the dates set forth below, among the following parties:

I.

BARBARA CAMERON, ELSPETH DePOULD and AGNES ROBERTS.

II.

WILLIAM KENT GANO, RICHARD C. GANO, JR., DORIS GANO WALLACE, ANNETTE GANO GRAGG and HOWARD HUGHES GANO.

III.

ANNETTE GANO LUMMIS, ALLENE LUMMIS RUSSELL, ANNETTE GANO LUMMIS NEFF, WILLIAM RICE LUMMIS and FREDERICK RICE LUMMIS, JR.

IV.

JANET HOUSTOUN DAVIS, SARA HOUSTOUN LINDSEY and JAMES PATRICK HOUSTOUN, JR.

---

2. [Petitioners' Note: Although the Mayer Affidavit identifies the original and amended settlement agreements as Exhibits F-1 and F-2, respectively, the actual documents attached to the Exhibit were both stamped Exhibit F. They are identified in this appendix as they were in the District Court.]

V.

JOHN McINTOSH HOUSTOUN, MARGOT FLEMING HOUSTOUN, JAMES WILKIN HOUSTOUN and RICHARD ALEXANDER HOUSTOUN (by his Guardian, MARIAN FLEMING HOUSTOUN COMSTOCK).

RECITALS

A. The parties are the heirs-at-law, known to exist as of the Effective Date, to the estate of Howard Robard Hughes, Jr. (the "Decedent"), who died on April 5, 1976, and are entering into this Settlement Agreement as such.

* * *

D. Although Wills purportedly executed by Decedent have been produced, the parties recognize that Decedent, in fact, may have died intestate.

E. If Decedent died intestate, the Estate will be divided and distributed in accordance with the laws of the jurisdiction in which, at the time of his death, he was legally domiciled or, as to certain classes of Estate property, the laws of the jurisdictions in which the property of the Estate is located. At the present time there is uncertainty as to which jurisdictions ultimately will be determined to be the jurisdictions controlling distribution. The parties have been advised that among the jurisdictions of possible domicile are Mexico, the Bahamas, England, Nicaragua, Canada, Nevada, Texas and California and that the laws of succession and descent and distribution of these particular jurisdictions conflict with one another.

* * *

IN WITNESS WHEREOF, this agreement has been executed effective on the dates set forth below.

* * *

THE STATE OF COLORADO
COUNTY OF DENVER — ss.

The foregoing instrument was acknowledged before me this 7th day of July, 1976, by ELSPETH DEPOULD.

Witness my hand and official seal.

Notary Public in and for
Denver County, Colorado

My Commission Expires
December 17, 1979

THE STATE OF COLORADO
COUNTY OF DENVER — ss.

The foregoing instrument was acknowledged before me this 10th day of July, 1976, by JOHN MCINTOSH HOUSTOUN.

Witness my hand and official seal.

Notary Public in and for
Denver County, Colorado

My Commission Expires
December 14, 1979

THE STATE OF COLORADO
COUNTY OF DENVER — ss.

The foregoing instrument was acknowledged before me this 10th day of July, 1976, by MARGOT FLEMING HOUSTOUN.

Witness my hand and official seal.

Notary Public in and for
Denver County, Colorado

My Commission Expires
December 17, 1979

THE STATE OF TEXAS
COUNTY OF HARRIS — ss.

BEFORE ME, the undersigned authority, on this day personally appeared ALLENE LUMMIS RUSSELL, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 12th day of July, 1976.

DOUGLAS E. CLARKE
Notary Public in and for
Harris County, Texas

Douglas E. Clarke
My Commission Expires
June 1, 1977

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES — ss.

On July 16, 1976, before me, the undersigned, a notary public in and for said State personally appeared RICHARD C. GANO, JR., known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

FLORENCE T. DORAN
Notary Public

[SEAL]

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES — ss.

On July 21, 1976, before me, the undersigned, a notary public in and for said State, personally appeared BARBARA CAMERON, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

WITNESS my hand and official seal.

MAUREEN E. FITCH
Notary Public

[SEAL]

Exhibit F to the Affidavit of Steven L. Mayer
in Support of Motion for Change of Venue, filed August 28, 1978

SUPPLEMENTAL AGREEMENT
TO SETTLEMENT AND ANCILLARY AGREEMENTS
OF JULY 1976
BETWEEN THE THEN KNOWN HEIRS-AT-LAW OF
HOWARD ROBARD HUGHES, JR.

THIS AGREEMENT ("Supplemental Agreement") is entered into on the dates set forth below, among the following parties:

I.

BARBARA CAMERON, ELSPETH DePOULD and AGNES ROBERTS.

II.

WILLIAM KENT GANO, RICHARD C. GANO, JR., DORIS GANO WALLACE, ANNETTE GANO GRAGG and HOWARD HUGHES GANO.

III.

ANNETTE GANO LUMMIS, ALLENE LUMMIS RUSSELL, ANNETTE GANO LUMMIS NEFF, WILLIAM RICE LUMMIS and FREDERICK RICE LUMMIS, JR.

IV.

JANET HOUSTOUN DAVIS, SARA HOUSTOUN LINDSEY and SOUTHERN NATIONAL BANK OF HOUSTON, Independent Executor of the ESTATE OF JAMES PATRICK HOUSTOUN, JR., DECEASED.

V.

JOHN McINTOSH HOUSTOUN, MARGOT FLEMING HOUSTOUN, JAMES WILKIN HOUSTOUN and RICHARD ALEXANDER HOUSTOUN (by his Guardian, MARIAN FLEMING HOUSTOUN COMSTOCK).

VI.

AVIS HUGHES McINTYRE and RUSH HUGHES.

RECITALS

A. In July, 1976, the parties named under captions I through V above entered into a Settlement Agreement effective as of July 1, 1976, and an Ancillary Agreement effective as of July 1, 1976, in order, among other things, to settle their respective claims, with respect to one another, as heirs-at-law in and to the Estate of Howard Robard Hughes, Jr. ("Decedent"), who died April 5, 1976. The Settlement Agreement and the Ancillary Agreement are by this reference incorporated herein and made a part hereof. As used in this Supplemental Agreement, the term "Estate" shall mean the estate of Decedent as it is defined in the Settlement Agreement.

* * *

Accordingly, in view of the foregoing and the respective covenants contained herein, and for other good and valuable consideration, receipt and sufficiency of which hereby is acknowledged, it is mutually agreed as follows:

* * *

4. Each party hereto hereby represents to each other party hereto that he or she knows of no facts which would entitle any person not a party hereto to a legitimate claim to a share of the Estate if Howard Robard Hughes, Jr., is ultimately found to have died intestate.

* * *

IN WITNESS WHEREOF, this Supplement Agreement has been executed by the parties hereto, on the dates set forth below.

* * *

THE STATE OF OHIO
COUNTY OF CUYAHOGA—ss

BEFORE ME, the undersigned authority, on this day personally appeared BARBARA CAMERON, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 11th day of June, 1977.

P. M. DAWSON
Notary Public in and for

.....

[SEAL]

THE STATE OF OHIO
COUNTY OF CUYAHOGA—ss

BEFORE ME, the undersigned authority, on this day personally appeared ELSPETH DePOULD, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 11th day of June, 1977.

P. M. DAWSON
Notary Public in and for

.....

[SEAL]

THE STATE OF MASS
COUNTY OF NORFOLK—SS.

BEFORE ME, the undersigned authority, on this day personally appeared ALLENE LUMMIS RUSSELL, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 16th day of June, 1977.

MARGARET L. GRIFFIN
Notary Public in and for

[SEAL]

THE STATE OF TEXAS
COUNTY OF HARRIS—SS.

BEFORE ME, the undersigned authority, on this day personally appeared RICHARD C. GANO, JR., known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 8th day of June, 1977.

DOUGLAS E. CLARKE
Notary Public in and for
Harris County, Texas

THE STATE OF COLORADO
CITY & COUNTY OF DENVER—SS.

BEFORE ME, the undersigned authority, on this day personally appeared JOHN McINTOSH HOUSTOUN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 10th day of June, 1977.

PATRICIA H. JONES
Notary Public in and for
City & County of Denver, Colorado
My Commission Expires Feb. 8, 1981

THE STATE OF TEXAS—SS.
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared MARGOT FLEMING HOUSTOUN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 9th day of June, 1977.

DOUGLAS E. CLARKE
Notary Public in and for
Harris County, Texas

Testimony of O. Clayton Lilienstern at the Hearing on Defendant Cory & Alvord's Motion for Change of Venue & Motion to Add Defendants, November 21, 1978

* * *

[39] CLAY LILIENSTERN having been called as a witness, and having been by the Court first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. GEORGE:

Q Mr. Lilienstern, state your name and address for the record.

A My name is O. Clayton Lilienstern, my business address is 2500 Exxon Building, Houston, Texas.

[40] Q You are a lawyer, is that right?

A Yes, I am a lawyer with Andrews, Kurth, Campbell & Jones.

Q Have you been involved in the Hughes estate matters in various courts?

A Yes, I have, since approximately April 20th of 1976. some two weeks following Mr. Hughes' death.

Q What courts does that involve?

A That has involved Probate Court No. 2 of Harris County, Texas, the District Court for the Eighth Judicial District of the State of Nevada, the Superior Court in Los Angeles, in which the Howard Hughes California administration is pending, also a court in the State of Delaware.

Q First of all, would you tell the Court whether or not it has been determined that Mr. Hughes died intestate?

A It has not. No heirship determination has been made, by any court, in which a Howard Hughes estate administration is pending.

Q Has anybody claimed that there is a will?

A Yes. There have been several types of claims concerning wills. Two wills have been determined not to be the last will and testament of Howard Hughes, one is the so-called

Mormon will, which was tried some eight months in Nevada; it was also tried to Probate Court [41] No. 2 in Houston; another was the so-called Grover Walker will, which was disposed of in a hearing before a probate Judge in Nevada. There are also some 35 other wills which have been accepted for filing by the County Clerk of Clark County, Nevada.

Q Okay. Is there a lost will claim?

A There is. The Howard Hughes Medical Institute has filed a petition to probate a lost or destroyed will in the State of Nevada. Nevada also entered an appearance in the Texas probate proceeding. Summary judgment motions are pending in both jurisdictions as to the Howard Hughes Medical Institute claim that there is a lost or destroyed will naming it as a beneficiary.

Q The sole beneficiary, is that right?

A I am not sure they claim sole beneficiary, but they certainly claim to be the principal beneficiary.

Q Okay. Now, the document known as the Mormon will, has that been conclusively litigated to be invalid?

A It has been litigated in the states of Nevada and Texas; it is still pending in California; no hearing has been held on it in California.

Q So, if that will is tried in California, and the jury finds it is valid, then we don't have any heirs, we have a testate succession, is that right?

A Well, presumably that would be the effect. My own [42] belief is it is very unlikely that that will, in the view of the prior determinations, will ever go to trial in California.

Q Now, have you prepared an exhibit for the Court showing the name or the list of people who have claimed to be heirs in the various courts?

A Yes. I have prepared a list showing appearances in the states of Texas, California and Nevada by appearance who claim to be heirs of Howard Hughes.

Q Okay. Is that marked Plaintiffs' Exhibit 1?

A Yes, that is Plaintiffs' Exhibit 1.

Q How many people, do you remember, that that totaled?

A I think the total is 413 persons, in the three jurisdictions, who have filed heirship claims.

Q Okay. Do you know whether these—the Probate Judge has found—these jurisdictions has found it necessary to appoint attorneys to represent unknown heirs?

A Yes. An ad litem was appointed by the Judge in the Harris County probate proceeding to represent the so-called unknown heirs of Howard Hughes. To [sic] ad litems were appointed in the State of Nevada to represent absent heirs, however, that order has been vacated since the date of the filing of our papers in this case; I made reference to it in the affidavit which was an attachment. But that order has been vacated.

[43] Q So, in Harris County they have a law firm, Butler-Binion?

A Butler, Binion, Rice, Cook & Knapp.

Q They were hired to represent, by the Probate Court, a class of people known as the unknown heirs; is that right?

A That is correct.

Q Okay.

MR. GEORGE: I will introduce Exhibit 1.

(Whereupon Plaintiffs'
(Exhibit No. 1 was received
(in evidence.

Q (By Mr. George) Now, could you briefly, for the Court, run through the other documents that you have prepared, showing the appearances in these Probate Courts and other courts?

A Yes. We put together a random sample of various pleadings by certain heirs. We picked those which contained the greatest number of appearances; one of them has some 161, I believe, persons, and another has about 160. Plaintiffs' Exhibits Numbered 2, 3, 4, 5 and 6 represent these random

pleadings which indicate appearances by various persons claiming heirship; these are all from the Texas Probate proceedings pending in Harris County, and this probably includes some, oh, 85 [44] to 90 percent of the persons who made heirship claims in that proceeding.

Q Now, these people are not the people who California seeks to join; is that right?

A With the exception of Plaintiffs' Exhibit 2, pertaining to Avis Hughes McIntyre and Rush Hughes; I believe those are included in the group of 22 that California seeks to join. With that exception, none of these individuals are included within that group.

Q Okay. And, there are 300 or so folks involved, is that right?

A 390-something in the Texas proceeding.

Q Who hired lawyers and came in and said they are the heirs?

A That is right.

MR. GEORGE: I will introduce Exhibits 2 through 6.

(Whereupon Plaintiffs'
(Exhibits 2 through 6 were
(received in evidence.

Q (By Mr. George) Now, briefly can you tell what Exhibit 8 is?

A Yes. Exhibit A—

Q Exhibit 8.

A Yes, Exhibit 8 is an appearance on behalf of Barbara [45] Francis Minton and Richard Hall Francis, with attached affidavits, which was filed in Probate No. 2 of Harris County, Texas, by the Austin firm of Clark, Thomas, Winters & Shapiro, and in which it is claimed that those two individuals are heirs of Howard Hughes.

Q And, those two individuals are not the heirs that these people that—

A They are not in the group of 22 which California seeks to join.

Q Okay.

MR. GEORGE: I will move the admission of Plaintiffs' Exhibit 8.

(Whereupon Plaintiffs'
(Exhibit No. 8 was received
(in evidence.

A Exhibit 7 is a letter from the Clerk of the 14th Court of Civil Appeals in Houston to all counsel, it relates that all counsel in the appeal of the Texas domicile case; it indicates that the Court ruled on a motion which was filed on behalf of the Texas administrators with the Appellate Court seeking, in effect, a stay of that proceeding pending a determination and for the duration of the temporary restraining order, which is in effect by Judge Roberts.

Q Okay.

[46] A It indicates that motion was granted.

MR. GEORGE: I will introduce Exhibit 7, and I have no more questions of Mr. Lilienstern.

(Whereupon Plaintiffs'
(Exhibit No. 7 was received
(in evidence.

MR. FALK: I have a few questions.

CROSS EXAMINATION

QUESTIONS BY MR. FALK:

Q Mr. Lilienstern, with respect to the various wills, the 35 wills that you have mentioned, are you familiar with a search that was performed by a California counsel and submitted to the California Probate Court concerning the possible existence of any will?

A Yes, I am.

Q And, that study concluded, did it not, that counsel, after a strenuous search, had been unable to locate any will which it concluded to be valid, isn't that right?

A I am not sure you can characterize any conclusion from that search. Certainly, no will was produced as a result of that search. But I believe the Howard Hughes Medical Institute has relied principally upon that will search, and the report, as the basis for its claim of a lost or destroyed will.

[47] Q With respect to the possibility of other intested [sic] heirs of Howard Hughes—that is, other than the 22 that we seek to add by this motion—are you familiar with the settlement agreement between the heirs?

A Yes, I am, generally so.

Q And, it recites there is — and it is before the Court — it recites therein, does it not, that the heirs have been advised by counsel?

A I would have to see a copy of it. I could probably get a copy pretty readily.

Q Would you do so, please?

A Surely. That was an exhibit to your —

Q Yes. Exhibit F to Mr. Mayer's declaration.

A Yes, I have that.

Q Let me see if I can draw your attention to —

A All right.

Q Why don't I go on to another question and I will come back to this, so Mr. Mayer can find the passage I am recalling?

A Okay.

Q Does the administrator contest the validity of the 35 wills that have been offered?

A No. An administrator cannot contest wills; it is the function of, really, any interested person, under most statutory schemes, to contest those wills.

[48] Q Your office represents a number of the heirs, I think 13 or 14 of the heirs?

A On some matters we do, yes.

Q In this capacity, have you filed pleadings challenging the authenticity of the 35 wills that have been offered?

A The only wills which we have filed pleadings contesting are the Grover-Walker will, which was — upon which a hearing was held in Las Vegas in the so-called Mormon will and the lost or destroyed will offered by the Howard Hughes Medical Institute, and in that instance we represented Mrs. Annette Gano Lummis only.

Q And, have any of the other 35 wills been offered; have petitions been filed seeking their admission?

A No, they are not.

Q They have not? With respect to any of the claims of heirship, has your office filed opposition to any of those claims of heirship at this time.

A I believe we have not. The heirship determination, at least in the Probate Courts of Nevada and Texas, have been, if you will, postponed pending a determination of any of the offered wills; the idea being that you have to first eliminate the possibility of testacy before you get to the issue of who the intestate heirs are. So we have not contested, to the best of my recollection, any of the heirship claims.

[49] Q I am sorry, we weren't aware that you were going to be testifying this morning, and I am a little unprepared. Drawing your attention to Paragraph H on Page 5, which is a recitation that states there, does it not, that the parties to the agreement have been advised separately — represented by counsel — advised them in connection with the settlement?

A With the desirability of such a settlement is the language there, yes.

Q There is a passage—I think we will be able to locate it in a moment—perhaps you recall where it is, Mr. Lilienstern?

A I have looked for it. You alluded to it earlier, and it may well be in here, but I have not seen it.

Q Obviously, I do not wish to inquire as to any advice you have given that it privileged, but have you in any non-privileged context—has your office expressed an opinion as to the validity to any of the other claims of heirship, that is, persons other than the 22 that are covered by this agreement?

A We have not specifically reviewed each claim of heirship and expressed an opinion, such as the heirs represented by Mr. Thomas' office. We have not tried to fit them into a genealogical chart to determine whether they may or may not be heirs at law of Howard [50] Hughes. We have, however, conducted a genealogical survey, if you will, and we have determined those persons that we believe would be the intestate heirs under the laws of Texas. It is clear that under the laws of California and Nevada that Mrs. Annette Gano Lummis is the sole heir; she is the only heir in those two jurisdictions.

Under the laws of Texas we believe we have identified those persons who are intestate heirs, with the exception of two persons, Avis Hughes McIntyre and Rush Hughes, both of whom asserted a claim under the theory of adoption by estoppel. It would have been necessary, had they not been included in the settlement agreement, for that doctrine to have been proven to the satisfaction of the Court of competent jurisdiction in order for them to be considered heirs at law.

Q But those two individuals are parties to the settlement agreement as amended, are they not?

A Yes, they are parties to Exhibit F—well, they are both Exhibit F—but the supplemental exhibit, yes.

Q Are you familiar with the statement that is on Page 7 of the estate's brief in this matter? Let me just read to you the passage I have in mind, it says: Plaintiffs are parties to that agreement in their individual capacity and believe that the parties to that agreement [51]—to the agreement referring, I take it, to the settlement agreement—believe that the parties to the agreement will eventually be determined to be the heirs at law of the decedent and that none of the documents purporting to be wills of the decedent will be admitted to probate.

A Yes, I am familiar with that.

Q Are you familiar with any facts which have come to your attention since that document was submitted which would cause you to alter your—or revise that statement?

A None whatsoever.

Q I think the reason we were having trouble finding the language is that it is in the supplemental agreement. If I can draw your attention to Paragraph 4 of that agreement, and let me read to you the statement that is contained therein.

A All right.

Q Each party hereto—

A Excuse me. What page is that on?

Q It is on Page 5.

A Okay.

Q Each party hereto hereby represents to each other party hereto that he or she knows of no facts which would entitle any person not a party hereto to a legitimate claim to a share of the estate if Howard Robard Hughes, [52] Jr. is ultimately found to have died intestate. And, again I ask you if you know of any facts since that statement was prepared that would cause that statement to be untrue?

A None.

Q So, as matters stand, so far as the heirs who are identified in the settlement agreement, so far as the 22 heirs are concerned, they believe in good faith, and they are advised by

their counsel in good faith, that Mr. Hughes died intestate and that they, as a group, represent all of the persons entitled to inherit under whatever applicable law of intestacy may apply; is that correct?

A That is correct.

MR. FALK: I have no further questions,

CROSS EXAMINATION

QUESTIONS BY MR. HILL:

Q Mr. Lilienstern, you will recall that when Mr. Falk was addressing the Court that he referred to a settlement agreement or an agreement between the State of California and the estate and made certain arguments to the Court that he felt were relevant here—

A Yes, sir.

Q —concerning the participation of the heirs in that agreement; do you remember that?

[53] A Yes, sir, I do.

Q This might be an appropriate time to let the record reflect, because we would do it some other time, in any event, since I know you have good familiarity with that agreement, certain aspects of it. And let the record reflect first: What was the nature of that agreement as to whether the State of California would receive any percentage of the to be established value of this entire estate even if Texas were finally adjudicated to be the domiciled state?

A I have a copy of it, and I would like to get it, Mr. Hill, if I may—

Q All right.

A —to insure that I am absolutely accurate.

THE COURT: Gentlemen, let's take a 15 minute recess.

(Whereupon, a recess was had at this time.)

Q (By Mr. Hill) Are you able to tell us at this point, following our morning recess, as to whether or not there

was contained, either in the basic agreement or supplemental letter agreements that were a part of the base agreement between California and the estate, a provision that California would retain 2 percent of the estate even if Texas was declared to be the domicile [54] state?

A You are talking about in connection the original action in the Supreme Court?

Q Yes, sir.

A Yes, sir, that is my understanding. California was guaranteed the 2 percent even if inheritance tax payments were made to the State of Texas.

Q And, then was it not further provided in that agreement that the State of California would receive 18 percent of the estate, 2 percent more than Texas could ever claim, if some other state other than Texas or California was declared to be the domicile state?

A If Nevada were declared to be, that is correct, because there would be no deduction from the 18 percent for taxes paid to Nevada.

Q Then, was there also contained in the agreement provision that the estate would furnish assistance to the State of California in the prosecution of their case, in terms of their investigation and legal memoranda?

A I know the administrators agreed to provide California with some materials; the exact nature of those materials I am not familiar with.

Q Now, Mr. Lilienstern, is it not your information that prior to the estate filing this case here in Judge Robert's [sic] court that California, the State of California, [55] acting through Mr. Falk, offered some inducement to the estate if they would file this proceeding in California?

A Certainly, the capsule [sic] for California encouraged us to file the interpleader in California or in Denver. As to inducements, I am not—Certainly, there was no formal agreement concerning any sort of settlement in exchange for filing in either of those two locations. Whether there were inferential suggestions of benefit, I am really not sure.

Q Wasn't it—

A I can certainly say we were encouraged to file it principally in Denver or in Los Angeles.

Q Without pinning you down, I notice that you and others in your law firm have worked on this; of course, you have been one of the lawyers that have been very active in it. Wasn't the inducement along the general lines of resurrecting the former agreement that you made in the Supreme Court?

A I am not sure I can say that, Mr. Hill. I was not a party to any conversation.

Q It is your understanding. I am not asking you to speak for anyone, I am just asking you to speak from your general understanding.

A It is my understanding it was implied that if the—

[56] MR. THOMAS: Your Honor, we are going to object. In the first place, we don't see the relevancy of any abandoned settlement agreement which is no longer operative, under any circumstance. Secondly, we are testifying about the content of documents, and the document is the best evidence of what it provides. And in the third place, I don't see that this has anything to do with any of the issues that are before the Court at this time. Apparently it is intended to be inflammatory and prejudicial and has nothing to do with the argument we presented.

THE COURT: That is overruled.

Q (By Mr. Hill) Give your best recollection.

A Well, it is my understanding that it was implied that certainly settlement negotiations, probably along the lines of the prior settlement agreement, would be undertaken if the action were filed in a forum other than Austin. All parties being aware of the fact, of course, that venue lies in the district where claimants reside, seeing California and Austin as the two possibilities. It was suggested that the heirs could be added, the action could be filed in Denver as a so-called neutral forum. We declined to do that.

Q Now, passing to another matter, while I have you here. Are you familiar with the California rulings, either at

[57] the administrative level, either at an administrative level by their comptroller's office or any rulings by their courts, as to whether or not Mr. Hughes was or was not domiciled in California at the time of—at some point from, say, 1966 up until the time of his death?

A There was a ruling by a California intermediate appellate court, in a case filed by Los Angeles Airways against Mr. Hughes and the Summa Corporation; I think the issue there was the effect of the California long arm statute jurisdiction over Mr. Hughes. This was at a time that he did not live within the state, I think he lived out of the country at that period of time. And I am familiar with a decision, perhaps unreported, although I have read it, in which the California court determined he was not a resident of California.

Q And what about the time—Is it not true that when Mr. Hughes sold his TWA stock in 1966, and had a gain on it of something in the neighborhood of 50 to 60 million dollars, that the State of California undertook to have him declared a domicile of [58] California at that time for purposes of assessing taxes against him?

A I am not familiar with that, Mr. Hill.

Q You are not familiar with that ruling?

A I am familiar with the fact that Mr. Hughes left California at or about the time of the sale of the TWA stock.

Q Are you familiar with an administrative ruling that was made following an investigation of his domicile—

A No, sir.

Q —by the State of California?

A No, sir.

Q All right. Did not the arguments and positions of the parties, that is, the estate and the State of Texas who were the litigants in the—the prime litigants in Houston, the domicile trial, did they not develop into a contest solely between Nevada domicile and Texas domicile?

A My understanding is that that is the way the case was presented.

Q And, presented to the Court in that fashion and argued in that fashion?

A That is my understanding.

MR. HILL: Thank you, sir.

MR. GEORGE: Your Honor, we move the admission of these exhibits. There have been no objections, and I don't believe the Court has ruled on them.

THE COURT: They will be admitted.

MR. GEORGE: Okay.

[59] (Whereupon, said exhibits (were received in evidence.

REDIRECT EXAMINATION

QUESTIONS BY MR. GEORGE:

Q Now, you had some questions from Mr. Falk concerning your law firm's or your judgment about whether some of your clients can win cases. Has there been any judicial determination, in any court, that Howard Hughes died intestate or who his heirs are?

A No. Certainly, my own beliefs are that we represent those persons who will be determined to be the heirs at law of Mr. Hughes; we are always confident when it comes to our clients' interest. I hope we are right, but no court has told us we are.

Q So, at this point the administrator is appointed by the courts and there is no heirship or determination of testacy or intestacy?

A That is correct.

MR. GEORGE: Pass the witness.

RECROSS EXAMINATION

QUESTIONS BY MR. FALK:

Q Mr. Lilienstern, you testified a moment ago, concerning conversations which occurred between the counsel for the estate and my office, me in particular. Were you a party to those conversations?

[60] A I have been a party to some of them. Which ones do you mean?

Q Whichever conversations you were referring to. You were a party to more than one of them?

A Mr. Hill asked me several questions about conversations betwen your office and the estate.

Q I am referring to conversations after the Supreme Court decision and before this lawsuit was filed here in this courtroom.

A I have been party to conversations during that period of time with your office, yes.

Q And, were you a party to any conversation in which I, or anyone else in my office, made any representation or offered any inducement, however you conceive it, to the estate in return for filing this lawsuit?

A No, sir, I was not.

Q It is true, is it not, that we encouraged your office to file the lawsuit in the District of Colorado?

A You encouraged us to join as parties the heirs contained in the settlement agreement—in the signator's settlement agreement—and to file it in Colorado, that is correct.

Q In other words, we encouraged you to do just what we are asking by this motion to have you compelled to do, isn't that right?

[61] A You encouraged us to file it in Colorado, and my recollection is you have half-heartedly encouraged us to file it in Los Angeles, but I think you conceded that it was extremely unlikely that we would do so.

Q And, do you recall the reasoning that we suggested to you as to why it ought to be brought in Colorado?

A Certainly, I think you felt your chances of prevailing were better in Denver than they are in Austin.

Q Was that the reason we offered—or encouraged you to file it in Denver—is that what we said, is that your testimony?

A You asked me my recollection of the reasons; I think those are the reasons. You keyed it to the neutral forum

theory, but it is implicit, it seems to me, in a forum argument that that is what you believe.

Q I am asking you to recall now, Mr. Lilienstern, what I said and not what you inferred or what was implicit. Wasn't it a fact that I said that would be a neutral forum, and encouraged you to file the action in the neutral forum?

A You certainly said it was a neutral forum.

Q And I did not, and no one else in my office, ever made any promise or offered any benefit to the estate for your doing that, isn't that correct?

A I think that is correct.

[62] MR. FALK: No further questions.

MR. GEORGE: I have no more questions of the witness.

MR. HILL: We have no more.

Filed May 11, 1979

In the United States District Court
Western District of Texas
Austin Division
[Title Omitted in Printing]

FIRST AMENDED COMPLAINT

Nature of the Action

1. This is an action in the nature of interpleader, including declaratory and injunctive relief. It is brought by the Texas Co-Administrators of the Estate of Howard R. Hughes, Jr., Deceased, to interplead, and for declaratory and injunctive relief (as hereinafter described) against, certain tax and other officials of California and Texas, the party Administrators, and also the United States of America, for the purpose of preventing other litigation that is costly, repetitious, and not meaningful; to resolve conflicting domicile claims; and for a unitary adjudication that protects the Estate against multiple claims and liability.

Parties

2. Plaintiff Annette Gano Lummis is a citizen of The State of Texas ("Texas"), and Plaintiff William Rice Lummis is a

citizen of The State of Nevada ("Nevada"); they are the Texas Temporary Co-Administrators ("Texas Administrators") of the Estate of Howard R. Hughes, Jr., Deceased ("Decedent") pending in Probate Court No. 2 of Harris County, Texas.

3. The assets comprising the estate of Decedent which are the subject of the several probate proceedings referred to herein are hereafter collectively referred to as the "Estate."

4. Defendant Mark White is the duly elected, qualified and acting Attorney General of Texas and is the successor in office to John Hill. Defendant Bob Bullock is the duly elected, qualified, and acting Comptroller of Public Accounts of Texas. Each official is a citizen of Texas; and each is charged by law with the duty of enforcing the death tax laws of Texas in a valid, legal manner.

5. Defendant White's business address is Supreme Court Building, Austin, Texas. His residence address is unknown to Plaintiffs but is located in Travis County, Texas.

6. Defendant Bullock's business address is 111 East Seventh Street, Austin, Texas. His residence address is 8301 Balcones Drive, Austin, Texas.

7. Defendant Kenneth Cory is the duly elected, qualified, and acting Controller of California. Defendant H. B. Alvord is the duly qualified and acting County Treasurer for the County of Los Angeles, California. Each official is a citizen of California; and each is charged by law with the duty of enforcing the death tax laws of California in a valid legal manner.

8. Defendant Cory's business address is Division of Inheritance and Gift Tax, 1227 O Street, Sacramento, California. His residence address is unknown to Plaintiffs but is located in California.

9. Defendant Alvord's business address is 500 West Temple Street, Room 137, Los Angeles, California. His residence address is unknown to Plaintiffs but is located in California.

10. Defendants William Rice Lummis and the First National Bank of Nevada are the Co-Special Administrators of the Estate in Nevada ("Nevada Administrators"). Defendant William Rice Lummis is a citizen of Nevada. Defendant First National Bank of Nevada is a national banking association located and having a principal place of business in Nevada; and is a citizen of Nevada as provided by 28 U.S.C. § 1348. The business address of Defendant Lummis is Summa Corporation, P.O. Box 14000, Las Vegas, Nevada 89156. His residence address is also Las Vegas, Nevada. The address of Defendant First National Bank of Nevada is P.O. Box 160, 302 E. Carson Avenue, Las Vegas, Nevada 89101. If it is ultimately determined that Decedent died a Nevada domiciliary, the intangible assets of the Estate will be remitted to the Nevada Administrators without diminution by reason of any state death tax.

11. Defendant William Rice Lummis is a citizen of Nevada and is the Ancillary Administrator of the Estate in Delaware ("Delaware Administrator").

12. Defendant William Rice Lummis is a citizen of Nevada and is the Provisional Administrator of the Estate in Louisiana ("Louisiana Administrator").

13. Defendant Richard Gano is a citizen of California and is the General Administrator of the Estate in California ("California Administrator"). His address is 2214 E. Sycamore Street, Anaheim, California 92806.

14. Defendant United States of America ("United States") is named a party as provided in 28 U.S.C. § 2410 and may be served by delivering a copy of the summons and complaint to the United States Attorney for the Western District of Texas, Jamie Boyd, whose address is Suite G-13, 655 East Durango, San Antonio, Texas 78206 and by sending a copy of the summons and complaint by certified mail to the Honorable Griffin Bell, Attorney General of the United States, Washington, D.C. 20530.

15. Jurisdiction over the subject matter and parties is conferred upon this Court by:

THE FEDERAL INTERPLEADER ACT

(a) 28 U.S.C. § 1335 in that:

(i) Plaintiffs William Rice Lummis and Annette Gano Lummis are citizens, respectively, of Nevada and Texas; are the Texas Administrators; and have in their custody or possession money or property of the value of $500.00 or more; and there are two or more adverse claimants, of diverse citizenship as defined in 28 U.S.C. § 1332, who are claiming or may claim to be entitled to such money or property, as hereinafter more fully appears.

(ii) In the action at bar, Defendants White and Bullock are citizens of Texas, and are claiming that Decedent died a Texas domiciliary, and that his Estate, including the aforesaid money and property, is subject to the death tax laws of Texas. These claims are adverse to the claims of Defendants Cory and Alvord, citizens of California, who are claiming that Decedent died a California domiciliary or domiciled without the United States, and that his Estate, including the aforesaid money and property is subject to the death tax laws of California.

The Defendants White and Bullock and Defendants Cory and Alvord are also claiming adversely to the following:

Plaintiffs, Texas Administrators;

Defendants Lummis and First National Bank of Nevada, Nevada Administrators; Defendant Lummis, Delaware Administrator; Defendant Lummis, Louisiana Administrator; and Defendant Gano, California Administrator. All of these parties claim that Decedent died domiciled in Nevada.

(iii) The United States is joined in this action pursuant to 28 U.S.C. § 2410. The United States has a federal estate tax claim and lien pursuant to 26 U.S.C. § 6324 upon the properties comprising the Estate of Howard R. Hughes, Jr., Deceased, the Administrators of which are:

a. *In the State of Nevada:*

William Rice Lummis, Co-Special Administrator
Summa Corporation
P.O. Box 14000
Las Vegas, NV 89156

First National Bank of Nevada, Co-Special Administrator
P.O. Box 160
302 East Carson Avenue
Las Vegas, NV 89101

b. *In the State of Texas:*

Annette Gano Lummis, Temporary Co-Administrator
2500 Exxon Building
Houston, TX 77002

William Rice Lummis, Temporary Co-Administrator
2500 Exxon Building
Houston, TX 77002

c. *In the State of Delaware:*

William Rice Lummis, Ancillary Administrator
c/o Morris, Nichols, Arsht and Tunnell
Twelfth and Market Street
P.O. Box 1374
Wilmington, DE 19899

d. *In the State of California:*
Richard C. Gano, Jr., General Administrator
c/o Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, CA 90071

e. *In the State of Louisiana:*
William Rice Lummis, Provisional Administrator
c/o Milling, Benson, Woodward, Hillyer & Pierson
11th Floor, Whitney Building
New Orleans, LA 70130

Defendants White and Bullock and Defendants Cory and Alvord are claiming or may claim adversely to the United States, which is claiming or may claim that the Decedent died a Nevada domiciliary.

There is, however, no adversity between the United States and the Administrators, enumerated above, all of whom are claiming that Decedent died domiciled in Nevada, and that the intangibles of the Estate are subject solely to the estate tax laws of the United States, to the exclusion of the tax claims of both Defendants White and Bullock and Defendants Cory and Alvord.

GENERAL FEDERAL QUESTION

(b) 28 U.S.C. § 1331 and this Court's pendent jurisdiction are additional jurisdictional bases for this action, in that this action arises under the Constitution and laws of the United States, as hereinafter more fully appears. The amount in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

CIVIL RIGHTS

(c) 42 U.S.C. § 1983, and its jurisdictional counterparts, 28 U.S.C. § 1343(3), and this Court's pendent jurisdiction afford

additional grounds for jurisdiction in that, *inter alia,* this is an action by plaintiffs on behalf of the Estate and other party Administrators, all of whom are citizens of the United States, to redress the deprivation by the Texas Defendants White and Bullock and the California Defendants Cory and Alvord, under color of law of their respective states, of valuable property rights, privileges and immunities of Plaintiffs that are secured by the Constitution and laws of Congress providing for equal rights of citizens of the United States.

Venue

16. Venue is laid in this District pursuant to 28 U.S.C. § 1397.

Background

17. Decedent died on April 6, 1976. On April 14, 1976, probate proceedings were initiated in the state courts of Texas, Nevada, and California. On May 4, 1976, an ancillary administration was initiated in Delaware, and on December 8, 1976, a provisional administration was initiated in Louisiana. All of these proceedings are pending; and the representatives of these Estate Administrations are parties to this action.

18. California and Texas each maintains, and has maintained at all relevant times herein, a system of death taxation whereby statutory claims and liens on the right of succession are imposed on real and tangible personal property located within its borders, and on the intangible personalty, wherever situated, of a person dying domiciled within that particular state. The authorities in each state, including Defendants White and Bullock in Texas and Defendants Cory and Alvord in California, are claiming that Decedent was domiciled in their respective state at the time of his death; and each set of state officials has taken steps to impose a tax on all the tangible assets of the Estate within its taxing juris-

diction, and on all the intangible assets of the Estate wherever situated. Additionally, Defendants Cory and Alvord are claiming that a part of the Estate is subject to California death tax on the ground that if Decedent did not die a California domiciliary, then he died domiciled without the United States. Plaintiffs allege that these aforesaid claims of domicile are conflicting; that each is without merit; and aver that Decedent died a Nevada domiciliary.

19. The intangible assets constitute almost the entire value of the Estate.

20. It is the law of both Texas and California that for death tax purposes a decedent has only one domicile at time of death; and since only the domiciliary state has the lawful right to tax the Decedent's intangibles, the claims of California and Texas are mutually exclusive.

21. On June 10, 1976, the Attorney General of Texas, and on October 13, 1976, the Comptroller of Public Accounts of Texas, filed appearances in the Texas probate proceeding, contending, *inter alia,* that Decedent was a Texas domiciliary at death and asserting a statutory death tax lien against all assets subject to Texas jurisdiction, including intangibles wherever located. On April 10, 1978, a judgment was entered in the Texas probate proceeding that Decedent was a Texas domiciliary at death. That judgment is being appealed, by the Texas Administrators in the Texas appellate courts, and therefore is not final. The appeal of that judgment has been stayed by the appellate court until dissolution of the Temporary Restraining Order previously issued by this Court or other injunctive relief which may hereafter be issued by this Court. California and Defendants Cory and Alvord are not parties to that proceeding and take the position that they will not be bound by and will accord no recognition to any judgment entered as to domicile therein.

22. California death tax proceedings were initiated with the appointment by the Superior Court, Los Angeles County, of an Inheritance Tax Referee to inventory and appraise the Estate sub-

ject to the jurisdiction of California. On August 24, 1977, Defendant Gano, California Administrator, submitted the California Inheritance Tax Declaration to the Referee. The California Administrator's Declaration asserted that Decedent was a Nevada domiciliary and reported only tangible personal and real property located in California. The Inheritance Tax Referee has stated that he intends to file a report with the Superior Court which takes the position that the Estate is liable for the California death tax on the ground that Decedent was domiciled in California at death and thereby tax the entire Estate, less the real and tangible personal property located outside California. Notice of the filing of the Report will be sent as required by law to all known persons potentially liable for the tax. Objections to the Report based, *inter alia,* on the claim of Nevada domicile, will be filed by the California Administrator, who will continue to maintain that Decedent died a Nevada domiciliary. This Report has not been filed, according to an affidavit of record in this action by the Inheritance Tax Referee, because the Referee believes that the Temporary Restraining Order previously entered by this Court enjoins him from doing so. The question of Decedent's domicile is therefore an issue in the California proceeding. Texas and Defendants White and Bullock are not parties to that proceeding and take the position that they will not be bound by and will accord no recognition to any judgment entered as to domicile therein.

23. Legal actions involving the Estate are also pending in the following jurisdictions:

(a) *Nevada.* Application to probate the so-called "Mormon Will" was filed in Nevada state court on April 30, 1976, by Noah Dietrich, as executor, and a contest to that application was filed by Annette Gano Lummis in her individual capacity on May 6, 1976. On June 23, 1976, the Attorney General of Texas filed a "Motion To Dismiss For Want Of Jurisdiction And Contest And Opposition To Probate" in the will contest proceeding in Nevada, con-

tending that Decedent was a Texas domiciliary at the time of his death and asking the Nevada court to stay its proceeding pending the outcome of the Texas proceeding. On August 27, 1976, the Nevada court denied the Texas Attorney General's Motion and ordered that the validity of the so-called "Mormon Will" be tried before a determination on the issue of domicile. The ensuing "Mormon Will" trial lasted some seven months. A judgment decreeing the will to be invalid was entered on June 23, 1978. The issue of domicile is still pending in the Nevada administration. The Texas Attorney General now disclaims that the appearance was a general appearance and asserts that neither Texas nor Defendants White or Bullock will be bound by or will accord recognition to any judgment as to domicile in that proceeding. Defendants Cory and Alvord have made no appearance in the Nevada proceeding and take the position that neither they nor California will be bound by or will accord recognition to any judgment as to domicile in that proceeding.

(b) *Delaware.* The vast majority of the assets of the Estate consist of the stock of Summa Corporation, a Delaware corporation wholly owned by the Decedent. On May 4, 1976, Summa Corporation instituted an interpleader action in the Chancery Court of New Castle County, Delaware, initially seeking a determination as to the ownership of its outstanding shares. Later the petition was amended so that the relief sought was a direction from the court as to which administrator is the domiciliary administrator to whom the shares should be remitted on termination of the Delaware administration. The Delaware Chancery Court has entered an order requiring Summa, until further order, to recognize William Rice Lummis, in his capacity as Ancillary Administrator of the Estate in Delaware, as the sole shareholder of Summa. Defendants Bullock and the Texas Attorney General appeared in the Delaware proceeding on or about June 11, 1976, and sought a dismissal of the action but now disclaim that their

appearance was a general appearance. Defendants White and Bullock take the position that neither they nor Texas will be bound by or will accord recognition to any judgment as to domicile in that proceeding. Defendants Cory and Alvord have made no appearance in the Delaware proceeding and take the position that neither they nor California will be bound by or will accord recognition to any judgment as to domicile in that proceeding.

24. On November 11, 1977, California filed with the United States Supreme Court a motion for leave to file with that Court a Bill of Complaint against Texas, seeking, *inter alia*, a decision that Decedent was not a Texas domiciliary at death. On June 22, 1978 the Court denied, *per curiam*, the California Motion. Four of the Justices, however, concurred in the view that the Estate had available as a remedy, to avoid conflicting state court judgments on domicile and resulting multiple death taxation, an interpleader action, brought in a federal district court under 28 U.S.C. §1335.

25. In view of (i) the continuing failure or unwillingness of both Texas and Defendants White and Bullock and California and Defendants Cory and Alvord to submit the basic issue of domicile to the jurisdiction of each other's courts, or to the jurisdiction of courts in other states, in such a manner that a conclusive adjudication would result, and (ii) the refusal of the United States Supreme Court to grant leave to California to file a complaint with that Court against Texas, Plaintiffs allege that a United States District Court with interpleader jurisdiction provides the only available forum wherein an adjudication of the domicile of Decedent, binding upon all indispensable parties, and all other persons, if any, needed for a just adjudication, including the Texas and California taxing officials, can be made and unlawful multiple taxation of the Estate avoided. Further, the threat of multiple litigation interferes with the orderly administration of the Estate, causes dramatically increased expenses of litigation for the Estate, and delays distribution of the Estate. Plaintiffs will

suffer irreparable harm and injury unless the present interpleader action is allowed to continue.

26. Decedent's Administrators in all jurisdictions have actively sought a just and reasonable settlement of the conflicting domicile and tax claims with the appropriate officials of Texas and California. To date all such efforts have been unsuccessful, thereby necessitating the institution of the case at bar.

COUNT I.

Claim for Interpleader

27. Plaintiffs reallege the allegations contained in Paragraphs 1-26 above.

28. The Plaintiffs in this action are the Texas Temporary Co-Administrators of the Estate of Howard R. Hughes, Jr., Deceased, and have in their custody Estate property exceeding the value of $500.00. There are numerous adverse claims to that and to other property of the Estate which are asserted by two or more claimants of diverse citizenship.

29. As a result of the facts hereinabove alleged, Plaintiffs are faced with the assertion of conflicting claims of domicile and death taxes that subject the Estate to costly and unwarranted expense and to the substantial risk that the courts of Texas and California will make inconsistent adjudications as to the liability of the Estate for death taxes, despite the fact that the lawful application of inheritance tax laws of Texas and California on intangible assets of the Estate must recognize that the claims are mutually exclusive.

30. Plaintiffs allege that the Estate would be insufficient to discharge the aggregate tax assessments claimed by Texas (approximately 16 percent), California (approximately 24 percent), and the United States (approximately 77 percent less an approxi-

mate 16 percent state tax credit, if allowed, or 61 percent), assessments which would result in a combined tax rate of 101 percent of the net federal taxable estate.

31. Because California law does not permit certain deductions from the gross estate which are allowable for federal estate tax purposes, California's real rate of taxation significantly exceeds its approximate 24 percent rate. Thus, should California and Texas each determine that Decedent was a domiciliary of its respective state, the Estate would be subjected to an effective death tax rate well in excess of 101 percent of the net federal taxable estate, and if the United States disallowed any tax credit on the theory that the Decedent died domiciled in Nevada (which has no inheritance tax), the Estate would be subject to even a more grotesque aggregate tax rate. Because of this and other related reasons, the unitary adjudication by this Court binding on all tax claimants is required.

32. The United States is a claimant because a lien exists in its favor against the Estate for payment of the federal estate tax. Plaintiffs admit the merits of the claim and lien status of the United States; and aver that there is no adversity between Plaintiffs and the United States, since successful assertion of Plaintiffs' claim that Decedent died a Nevada domiciliary would enable the United States to collect approximately 77 percent of the federal taxable estate undiminished by any credit for state death tax on intangibles. There is, however, adversity between the United States and Defendants White and Bullock who claim that Decedent died a Texas domiciliary and between the United States and Defendants Cory and Alvord who claim that Decedent died a California domiciliary or domiciled without the United States. Either claim, if sustained, would reduce the amount due the United States by approximately 16 percent of the net federal taxable estate. The United States is a party needed for a just adjudication under Rule 19, Federal Rules of Civil Procedure,

because it has a significant interest in receiving the full federal estate tax undiminished by a state death tax credit on intangibles. If the Estate pays a state death tax to any state, the United States will be obligated to grant the Estate a state death tax credit up to the maximum allowed (approximately 16 percent), under the mandatory language of 26 U.S.C. § 2011. This action, therefore, provides the United States with the only opportunity it will have to litigate its entitlement to that amount.

33. Plaintiffs have no plain, speedy and efficient remedy in the state courts of either Texas or California. Only a federal forum can obtain jurisdiction over all indispensable parties and render an adjudication binding upon all persons having an interest in the subject matter of this case.

34. Federal interpleader in a proper United States District Court is available and provides an effective remedy to prevent multiple death taxes on the intangible property of the Decedent where the sole basis of the tax is the domicile of the Decedent at the time of death. In equity and good conscience, the present federal interpleader action should now proceed so that costly, repetitious litigation in various state forums may be barred and a unitary adjudication rendered that will prevent multiple state death taxation that is arbitrary, confiscatory, and violative of the due process clause of the Fourteenth Amendment and the civil rights of the Plaintiffs and the parties they represent, all as secured by the Constitution and laws of the United States.

35. The prosecution, during the pendency of this action, of proceedings in the various state courts to determine the domicile of Decedent at the time of death will adversely affect the property involved in this action and will interfere with the jurisdiction of this Court. Defendants White and Bullock and Defendants Cory and Alvord and the various party Administrators should be enjoined pursuant to 28 U.S.C. § 2361 and Rule 65, Federal Rules of Civil Procedure, from continuing, instituting, or prosecuting

any proceeding to determine the domicile of Decedent at the time of death, other than in this action. Plaintiffs allege that reasonable cause exists for failure to make any state death tax payments until the issue of Decedent's domicile is finally determined in this action. Defendants Bullock, Cory, White, and Alvord should be further enjoined from asserting or prosecuting any claim for state death taxes or any penalties based upon a failure to pay such death taxes prior to the final determination of this action.

36. Property and funds being administered by Plaintiffs and the Defendant Administrators are held by them in their fiduciary capacities and are subject to the supervision and control of the probate courts described above. Accordingly, they cannot deposit said property and funds with this Court. Plaintiffs, as individuals, are subject to the in personam jurisdiction of the Court and will abide by the final judgment rendered in this action respecting the conflicting claims which are the subject hereof, and are prepared to give such bond to the Clerk of this Court as the Court may deem proper. Plaintiffs further allege, in this regard, that because their conduct, and that of the party Administrators, with respect to the property and funds within their control, is subject to fiduciary standards and judicial control by the various probate courts, a bond in a nominal amount will protect the legitimate interests of the remaining Defendants.

37. Plaintiffs allege that the acts of Defendants White and Bullock, purportedly on behalf of Texas, as hereinabove alleged, and the acts of Defendant Cory, purportedly on behalf of California, and the acts of Defendant Alvord, purportedly on behalf of the County of Los Angeles, as alleged hereinabove, are in fact and in law wholly without any valid legal authority for the reason that Decedent was a Nevada domiciliary at the time of his death. Decedent, therefore, could not have been a domiciliary of any other jurisdiction, and under the inheritance laws of both Texas and California domiciliary death taxes cannot lawfully be imposed.

38. Plaintiffs allege that Defendants White and Bullock of Texas and Defendants Cory and Alvord of California, while acting under color of state law, have been and are now tort-feasors in that they have been and are now acting without legal warrant.

COUNT II

General Federal Question

39. Plaintiffs reallege the allegations contained in Paragraphs 1-38 above.

40. Plaintiffs allege that even if Decedent were not domiciled in Nevada at the time of his death, nevertheless, the acts of Defendant White and Defendant Bullock, and each of them, purportedly on behalf of the state of Texas, as hereinabove alleged, constitute a denial of due process of law in violation of the Fourteenth Amendment of the United States Constitution for the reason that while the law of each of the states of Texas and California recognizes that a decedent has but one domicile for purposes of death taxes, the proceedings in neither state can protect the Estate from having to make multiple payments of the same obligation on the intangibles of the Estate.

41. Plaintiffs allege that even if Decedent were not domiciled in Nevada at the time of his death, nevertheless, the acts of Defendant Cory, purportedly on behalf of the state of California, as hereinabove alleged, and Defendant Alvord, purportedly on behalf of the County of Los Angeles, as hereinabove alleged, constitute a denial of due process of law in violation of the Fourteenth Amendment of the United States Constitution for the reason that while the law of each of the states of Texas and California recognizes that a decedent has but one domicile for purposes of death taxes, the proceedings in neither state can protect the Estate from having to make multiple payments of the same obligation on the intangibles of the Estate.

COUNT III

Civil Rights

42. Plaintiffs reallege the allegations contained in Paragraphs 1-41 above.

43. Plaintiffs allege that only a United States District Court exercising interpleader jurisdiction can provide a plain, speedy, and efficient remedy, that can secure the presence of indispensable parties needed for a just adjudication, with respect to all of the assets of the Estate; the state officials of both Texas and California are aware of this, yet they have blocked and are now attempting to block a unitary adjudication by this Court that would be fair to all concerned; and that the aforesaid conduct has constituted and will constitute, unless restrained, a deprivation to the Estate of rights, privileges and immunities, secured it by the Constitution and federal law, all without due process of law as guaranteed by the Fourteenth Amendment.

44. Plaintiffs allege that the right to travel from state to state is a right protected by the United States Constitution. The actions of Defendants White and Bullock and Defendants Cory and Alvord, under color of state law, will and are designed to penalize Decedent's Estate because of Decedent's travel among various states.

45. Plaintiffs allege that Defendants White and Bullock and Defendants Cory and Alvord are acting under color of state law to deprive the as yet undetermined heirs ("heirs") of rights and privileges and immunities guaranteed them by the Fourteenth Amendment of the United States Constitution, in violation of the provisions of 42 U.S.C. § 1983. Defendants White and Bullock and Defendants Cory and Alvord claim the right to obtain in the courts of their respective states a judgment concerning the issue of the Decedent's domicile at death. Based on such judgments, both sets of Defendant taxing officials assert the right to levy a tax upon the passing of the intangible assets under the laws of

their respective states. The power of a state to tax the heirs of an estate is based exclusively on the state's power to transfer title in the property to the heirs. However, in the face of conflicting adjudications, none of the Defendant taxing officials or the states on whose behalf they purport to act would have the power or capability to award dominion and control of the intangible assets to the heirs. For the Defendant officials to endeavor to tax the heirs, despite the fact that the heirs cannot obtain from the states any power of dominion and control over the intangible assets of the Estate, is a clear violation of due process and equal protection of the law as guaranteed by the Fourteenth Amendment. Plaintiffs, as Administrators of the Estate, are proper parties to assert the rights and privileges and immunities of the heirs.

46. Plaintiffs further allege that Defendants White and Bullock and Defendants Cory and Alvord are acting under color of state law to deprive the heirs of their Fourteenth Amendment rights by assertions and attempts to impose personal liability on the heirs for death taxes upon intangibles. In the event of conflicting domiciliary adjudications, the death tax liability will exceed the assets of the Estate. If, as the Defendant taxing officials assert, the heirs are personally liable for payment of death taxes, the heirs will be required to pay the deficiency from their personal assets. Exacting such a penalty because of a family relationship deprives the heirs of equal protection of the law and due process as guaranteed by the Fourteenth Amendment of the United States Constitution. Plaintiffs, as Administrators of the Estate, are proper parties to assert the rights and privileges and immunities of the heirs.

47. Accordingly, Defendants White and Bullock and Defendants Cory and Alvord, and each of them, should be enjoined from depriving Plaintiffs, under color of state law, of valuable property rights without according Plaintiffs both due process of law and equal protection of the law, by proceeding in different forums, none of which can afford jurisdiction over all indispensable parties.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court:

1. Require that the Defendants White, Bullock, Cory, and Alvord; and the party Administrators; and the Defendant United States, all be ordered to interplead in this action their claims against the assets comprising the Estate.

2. Adjudge and declare that Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death, and that all parties to this action abide by that declaration.

3. Adjudge and declare that Plaintiffs are not liable to either Texas or California for death taxes levied on intangibles of Decedent's Estate and that Defendants White and Bullock and Defendants Cory and Alvord are acting without any legal warrant and will continue so to act unless restrained by this Court; and that they and each of them be enjoined from levying and collecting death taxes on the intangible assets of the Estate.

4. Restrain and enjoin Defendants White, Bullock, Cory, and Alvord; and the party Administrators; and their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them, from instituting or prosecuting any proceeding in any state or United States court, the result of which will or would be to determine the domicile of the Decedent at death, other than in this action.

5. Restrain and enjoin the Defendants White and Bullock and Defendants Cory and Alvord, and their officers, agents, servants, employees, and attorneys and those persons in active concert or participation with them, and each of them, from assessing or collecting any penalties against Plaintiffs for failure to pay state death taxes which may otherwise accrue during the pendency of this suit.

6. In the alternative, should the Court determine that Decedent was domiciled in a jurisdiction other than Nevada, then adjudge and declare in which other jurisdiction Decedent was domiciled at the time of his death and further adjudge and declare that he was domiciled only in that jurisdiction at the time of his death and that all parties to this action abide by that declaration.

7. Grant Plaintiffs all other and further relief, including their costs and attorneys' fees, to which entitlement is shown.

Respectfully submitted,

O. CLAYTON LILIENSTERN
O. Clayton Lilienstern
Patricia A. Stevenson
Robert R. Herring, Jr.

ANDREWS, KURTH, CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002
(713) 652-2500

R. JAMES GEORGE, JR.
GRAVES, DOUGHERTY, HEARON, MOODY & GARWOOD
2300 Austin National Bank Tower
Austin, Texas 78701
(512) 478-6421
Attorneys for Plaintiffs, William Rice Lummis and Annette Gano Lummis

Of Counsel:
PROFESSOR JAMES WILLIAM MOORE
54 Meadow Street
New Haven, Connecticut 06506

AFFIDAVIT

THE STATE OF TEXAS
COUNTY OF HARRIS—ss

BEFORE ME, the undersigned authority, personally appeared O. Clayton Lilienstern, a person to me well known who on his oath did depose and say that he has read the following First Amended Complaint, that he has personal knowledge of the facts recited therein and those facts are true and correct.

O. CLAYTON LILIENSTERN
Affiant

(Jurat Omitted in Printing)

(Certificate of Service Omitted in Printing)

Filed May 18, 1979

In the United States District Court
for the Western District of Texas
Austin Division

(Title Omitted in Printing)

PLAINTIFFS' REQUEST OF DEFENDANT BULLOCK FOR ADMISSION OF FACTS PURSUANT TO RULE 36, FEDERAL RULES OF CIVIL PROCEDURE

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Plaintiffs request Defendant Bob Bullock, Comptroller of Public Accounts of the State of Texas, to admit, for the purposes of this action only, the truth of the following facts:

1) Defendant Bullock is a citizen of Texas.

2) Defendant Bullock is the duly elected, qualified, and acting Comptroller of Public Accounts of the State of Texas and as such is charged with assessing and collecting the Texas inheritance tax in a valid, legal manner.

3) Defendant Bullock claims, and has claimed at all relevant times herein, that Decedent, Howard R. Hughes, Jr., was domiciled in Texas at death.

4) Defendant Bullock claims that Howard R. Hughes, Jr. could have only one domicile at death.

5) Defendant Bullock denies that Decedent, Howard R. Hughes, Jr. was domiciled in Nevada at death.

6) Defendant Bullock denies that Decedent, Howard R. Hughes, Jr. was domiciled in California at death.

7) Defendant Bullock claims that the intangible assets of the Estate of Howard R. Hughes, Jr., wherever located, are subject to inheritance taxation under the laws of Texas, because Hughes was domiciled within the state of Texas at death.

8) On October 13, 1976, Defendant Bullock filed an Appearance in Cause No. 139,362, in Probate Court No. 2, Harris County, Texas, and claimed that Howard R. Hughes, Jr. was domiciled in Texas at death, and that a lien existed in favor of the state of Texas upon his entire Estate.

9) On April 10, 1978, Defendant Bullock, as a party to the action in Probate Court No. 2, Harris County, Texas, obtained a judgment declaring that Howard R. Hughes, Jr. was domiciled within the state of Texas at death. An appeal from this judgment has been perfected by the Plaintiff Texas Administrators and is now pending.

10) Since the death of Howard R. Hughes, Jr., Defendant Bullock has refused to submit to the jurisdiction of the state courts of California, and claims that he would not be bound by a judgment of the courts of California or of any other state purporting to determine the domicile of Hughes at death.

11) Defendant Bullock claims that the inheritance tax laws of Texas impose a liability for payment of the inheritance tax upon the heirs-at-law of a decedent. Therefore, Defendant Bullock claims that if the tax cannot be collected from the Estate of Howard R. Hughes, Jr., then he has the right to proceed directly against Hughes' heirs-at-law and to levy upon and collect the tax from their personal assets.

12) If the Texas Courts make a determination that Howard R. Hughes, Jr. was domiciled at death in Texas, then Texas

inheritance tax law with respect to intangibles will not provide a credit, reduction, or other recognition against Texas inheritance taxes for domicile-based inheritance taxes paid to any other state.

13) Unless restrained from doing so by this Court, Defendant Bullock will continue to prosecute his claim to inheritance taxes on the intangible assets of the Estate of Howard R. Hughes, Jr. based on his claim that Hughes was domiciled in Texas at the time of his death.

ANDREWS, KURTH, CAMPBELL & JONES
By O. CLAYTON LILIENSTERN
2500 Exxon Building
Houston, Texas 77002
(713) 652-2500
GRAVES, DOUGHERTY, HEARON, MOODY & GARWOOD
R. James George, Jr.
2300 Austin National Bank Tower
Austin, Texas 78701
(512) 478-6421

Attorneys for Plaintiffs, William Rice Lummis and Annette Gano Lummis

Of Counsel:
PROFESSOR JAMES WILLIAM MOORE
54 Meadow Street
New Haven, Connecticut 06506

(Certificate of Service Omitted in Printing)

Filed May 18, 1979

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

PLAINTIFFS' REQUEST OF DEFENDANT WHITE FOR ADMISSION OF FACTS PURSUANT TO RULE 36, FEDERAL RULES OF CIVIL PROCEDURE

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Plaintiffs request Defendant Mark White, Attorney General of the State of Texas, to admit, for the purposes of this action only, the truth of the following facts:

1) Defendant White is a citizen of Texas.

2) Defendant White is the duly elected, qualified, and acting Attorney General of Texas and as such is charged with enforcing the laws of Texas in a valid, legal manner.

3) Defendant White, and his predecessor in office John Hill, claim and have claimed at all relevant times herein, that Decedent, Howard R. Hughes, Jr., was domiciled in Texas at death.

4) Defendant White claims that Howard R. Hughes, Jr. could have only one domicile at death.

5) Defendant White denies that Decedent, Howard R. Hughes, Jr. was domiciled in Nevada at death.

6) Defendant White denies that Decedent, Howard R. Hughes, Jr. was domiciled in California at death.

7) Defendant White claims that the intangible assets of the Estate of Howard R. Hughes, Jr., wherever located, are subject to inheritance taxation under the laws of Texas, because Hughes was domiciled within the state of Texas at death.

8) On June 10, 1976, the Attorney General of Texas filed an Appearance in Cause No. 139,362, in Probate Court No. 2, Harris County, Texas, claiming that Howard R. Hughes, Jr. was domiciled in Texas at death.

9) On April 10, 1978, the Attorney General of Texas, as a party to the action in Probate Court No. 2, Harris County, Texas obtained a judgment declaring that Howard R. Hughes, Jr. was domiciled within the state of Texas at death. An appeal from this judgment has been perfected by the Plaintiff Texas Administrators and is now pending.

10) Since the death of Howard R. Hughes, Jr., Defendant White (and his predecessor in office, John Hill) has refused to submit to the jurisdiction of the state courts of California, and claims that he would not be bound by a judgment of the courts of California or of any other state purporting to determine the domicile of Hughes at death.

11) Defendant White claims that the inheritance tax laws of Texas impose a liability for payment of the inheritance tax upon the heirs-at-law of a decedent. Therefore, Defendant White claims if the tax cannot be collected from the Estate of Howard R. Hughes, Jr., then he has the right to proceed directly against Hughes' heirs-at-law and to levy upon and collect the tax from their personal assets.

12) If the Texas Courts make a determination that Howard R. Hughes, Jr. was domiciled at death in Texas, then Texas inheritance tax law with respect to intangibles will not provide for a credit, reduction, or other recognition against Texas inheritance taxes for domicile-based inheritance taxes paid to any other state.

13) Unless restrained from doing so by this Court, Defendant White will continue to prosecute his claim to inheritance taxes on the intangible assets of the Estate of Howard R. Hughes, Jr.

based on his claim that Hughes was domiciled in Texas at the time of his death.

ANDREWS, KURTH, CAMPBELL & JONES

By .....

O. Clayton Lilienstern
2500 Exxon Building
Houston, Texas 77002
(713) 652-2500

GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD
R. James George, Jr.
2300 Austin National Bank Tower
Austin, Texas 78701
(512) 478-6421

Attorneys for Plaintiffs' William Rice Lummis and Annette Gano Lummis

Of Counsel:
PROFESSOR JAMES WILLIAM MOORE
54 Meadow Street
New Haven, Connecticut 06506

(Certificate of Service Omitted in Printing)

Filed June 4, 1979

In the United States District Court
for the Western District of Texas
Austin Division

(Title Omitted in Printing)

DEFENDANTS CORY'S AND ALVORD'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Cory and Alvord, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and file this Motion to Dismiss the above-styled and numbered cause. As grounds therefor the Defendants would respectfully show as follows:

I.

The Plaintiffs' First Amended Complaint is barred by the Eleventh Amendment of the United States Constitution and by the doctrine of sovereign immunity.

II.

This Court lacks jurisdiction over the subject matter of Plaintiffs' interpleader claim because there are not "two or more adverse claimants of diverse citizenship," as required by 28 U.S.C. § 1335.

III.

The Plaintiffs' First Amended Complaint fails to state a constitution [sic] claim upon which relief can be granted under 28 U.S.C. §§ 1331 and 1343(3). The assertion of pendent jurisdiction would be improper since there is no jurisdiction over the interpleader cause of action.

IV.

This Court lacks jurisdiction over the persons of Defendants Cory and Alvord for any alleged claim under 28 U.S.C. §§ 1331 and 1343(3).

V.

The venue of this action in the Western District of Texas for any alleged claim under 28 U.S.C. §§ 1331 and 1343(3) is improper.

VI.

The Defendants Cory and Alvord have previously filed a memorandum in support of their Motion to Dismiss the Plaintiff's Original Complaint. That memorandum was filed on February 12, 1979. Rather than burdening the Court's files with another copy of that memorandum, the Defendants Cory and Alvord would respectfully refer the Court to that memorandum, which is equally applicable to this motion. The reply of Defendants Cory and Alvord to the Plaintiffs' response to that memorandum will be filed on or before June 13, 1979, as per the order of the Court.

WHEREFORE, PREMISES CONSIDERED, the Defendants Cory and Alvord respectfully pray that the above-styled and numbered cause be dismissed and that all costs be taxed against the Plaintiffs.

Respectfully submitted,

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI,
CANADY & POLLACK
A Professional Corporation
650 California Street
Suite 2900
San Francisco, California 94108

DONALD S. THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
1200 Capital National Bank Building
P. O. Box 1148
Austin, Texas 78767

By: PAUL J. VAN OSSELAER
Attorneys for Defendants
Cory and Alvord

Of Counsel:
MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, California 90012

Filed June 18, 1979

In the United States District Court
for the
Western District of Texas
Austin Division

[Title Omitted in Printing]

DEFENDANT WHITE'S RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION OF FACTS

With respect to the truth of the matters in the numbered statements in Plaintiffs' Request for Admission of Facts served herein on May 18, 1979, Defendant Mark White, Attorney General of the State of Texas, responds in correspondingly numbered paragraphs as follows:

1. Denied. Defendant White admits that as a private individual he is a citizen of the State of Texas; however, he denies that as a defendant in his official capacity as the Attorney General of the State of Texas he is a citizen of Texas for purposes of diversity jurisdiction.

2. Admitted.

3. Admitted.

4. Denied. Defendant White admits that he claims Hughes had only one domicile at death (Texas) but recognizes the possibility of differing determinations of domicile by the judicial systems of two or more states and therefore must deny that Hughes "could have only one domicile at death."

5. Admitted.

6. Admitted.

7. Qualifiedly admitted. The statement is not untrue on its face, but good faith impels Defendant White to deny the false

impression created by final clause—*viz.*, that Defendant White claims that the intangible assets of the Hughes estate are subject to Texas inheritance taxation *solely* because Hughes was domiciled in Texas at death. On the contrary, Defendant White asserts that the estate's intangible assets are subject to Texas inheritance taxation on any basis (and to the fullest extent) permitted by the laws of the State of Texas and the Constitution of the United States.

8. Qualifiedly admitted. A pleading styled "Appearance of the State of Texas" was so filed by the Attorney General of Texas on behalf of the State of Texas.

9. Admitted.

10. Qualifiedly admitted. Defendant White has not refused to submit to the jurisdiction of the state courts of California for a determination of Hughes' domicile, as he is unaware of any domicile litigation pending there in which an opportunity to refuse to join existed. Defendant White admits that he has not submitted the issue of Hughes' domicile at death to the California state courts and that if he were now presented the chance to do so (and if he were not restrained from doing so), he would decline. Defendant White further admits that he has not submitted the issue of Hughes domicile at death to the courts of any state except Texas and, as matters now stand, will not be bound by the domicile judgment of any state court not located in Texas.

11. Qualifiedly admitted. Defendant White admits he claims that any person acquiring any portion of an estate subject to taxation under the inheritance tax laws of the State of Texas is personally liable for the tax imposed by those laws. He further admits he claims that unless that tax is paid or unless the lien securing its payment is released the tax may be collected from any distributee to the fullest extent permitted by the laws of the State of Texas and the Constitution of the United States. However Defendant White denies he claims that the extent of a distributee's personal liability for Texas death taxes can exceed the value of the estate property received by that distributee.

12. Objection. Defendant White refuses to answer paragraph number twelve because it requests the admission of a pure question of law and is therefore improper under Rule 36 of the Federal Rules of Civil Procedure.

13. Qualifiedly admitted. Defendant White admits that the statement is not untrue, but denies the false impression created by the final clause, which is the same as that found objectionable in paragraph number seven. Unless restrained by court order, Defendant White will continue to prosecute the inheritance tax claim of the State of Texas on the intangible assets of the Hughes estate on any basis (and to fullest extent) permitted by the laws of the State of Texas and the Constitution of the United States.

Respectfully submitted,

MARK WHITE
The Attorney General of Texas

DAVID DEADERICK
Assistant Attorney General
P.O. Box 12548, Capital Station
Austin Texas 78711

RICK HARRISON
McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
Attorneys for Defendant White

[Certificate of Service Omitted in Printing]

Filed June 18, 1979

In the United States District Court
for the
Western District of Texas
Austin Division

[Title Omitted in Printing]

DEFENDANT BULLOCK'S RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION OF FACTS

With respect to the truth of the matters in the numbered statements in Plaintiffs' Request for Admission of Facts served herein on May 18, 1979, Defendant Bob Bullock, Comptroller of Public Accounts of the State of Texas, responds in correspondingly numbered paragraphs as follows:

1. Denied. Defendant Bullock admits that as a private individual he is a citizen of the State of Texas; however, he denies that as a defendant in his official capacity as the Comptroller of Public Accounts of the State of Texas he is a citizen of Texas for purposes of diversity jurisdiction.

2. Admitted.

3. Admitted.

4. Denied. Defendant Bullock admits that he claims Hughes had only one domicile at death (Texas) but recognizes the possibility of differing determinations of domicile by the judicial systems of two or more states and therefore must deny that Hughes "could have only one domicile at death."

5. Admitted.

6. Admitted.

7. Qualifiedly admitted. The statement is not untrue on its face, but good faith impels Defendant Bullock to deny the false impression created by final clause— *viz.*, that Defendant Bullock claims that the intangible assets of the Hughes estate are subject

to Texas inheritance taxation *solely* because Hughes was domiciled in Texas at death. On the contrary, Defendant Bullock asserts that the estate's intangible assets are subject to Texas inheritance taxation on any basis (and to the fullest extent) permitted by the laws of the State of Texas and the Constitution of the United States.

8. Admitted.

9. Admitted.

10. Qualifiedly admitted. Defendant Bullock has not refused to submit to the jurisdiction of the state courts of California for a determination of Hughes' domicile, as he is unaware of any domicile litigation pending there in which an opportunity to refuse to join existed. Defendant Bullock admits that he has not submitted the issue of Hughes' domicile at death to the California state courts and that if he were now presented the chance to do so (and if he were not restrained from doing so), he would decline. Defendant Bullock further admits that he has not submitted the issue of Hughes domicile at death to the courts of any state except Texas and, as matters now stand, will not be bound by the domicile judgment of any state court not located in Texas.

11. Qualifiedly admitted. Defendant Bullock admits he claims that any person acquiring any portion of an estate subject to taxation under the inheritance tax laws of the State of Texas is personally liable for the tax imposed by those laws. He further admits he claims that unless that tax is paid or unless the lien securing its payment is released the tax may be collected from any distributee to the fullest extent permitted by the laws of the State of Texas and the Constitution of the United States. However Defendant Bullock denies he claims that the extent of a distributee's personal liability for Texas death taxes can exceed the value of the estate property received by that distributee.

12. Objection. Defendant Bullock refuses to answer paragraph number twelve because it requests the admission of a pure question of law and is therefore improper under Rule 36 of the Federal Rules of Civil Procedure.

13. Qualifiedly admitted. Defendant Bullock admits that the statement is not untrue, but denies the false impression created by the final clause, which is the same as that found objectionable in paragraph number seven. Unless restrained by court order, Defendant Bullock will continue to prosecute the inheritance tax claim of the State of Texas on the intangible assets of the Hughes estate on any basis (and to fullest extent) permitted by the laws of the State of Texas and the Constitution of the United States.

Respectfully submitted,

MARK WHITE
The Attorney General of Texas
DAVID DEADERICK
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
RICK HARRISON

McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
Attorneys for Defendant Bullock

[Certificate of Service Omitted in Printing]

Filed June 20, 1979

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

RESPONSES BY DEFENDANT CORY TO PLAINTIFFS' REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendant Kenneth Cory, Controller of the State of California, hereby responds to the Requests for Admission previously served upon him by Plaintiffs.

Request for Admission No. 1:

Defendant Cory is a citizen of California.

Response to Request for Admission No. 1:

Defendant Cory admits Request No. 1 only insofar as he construes it to refer to his personal citizenship as an individual. The Request does not assert that Defendant Cory is a citizen of California (a) for diversity purposes or (b) in his capacity as the Controller of the State of California and, accordingly, Defendant Cory neither admits nor denies these assertions.

Request for Admission No. 2:

Defendant Cory is the duly elected, qualified, and acting Controller of the State of California and as such is charged with enforcing the inheritance tax laws of California in a valid, legal manner.

Response to Request for Admission No. 2:

Defendant Cory admits Request No. 2.

Request for Admission No. 3:

Defendant Cory claims, and has claimed at all relevant times herein, that Decedent, Howard R. Hughes, Jr., was domiciled in California at death.

Response to Request for Admission No. 3:

Defendant Cory admits Request No. 3. In the alternative, Defendant Cory claims that Decedent was domiciled outside the United States at the time of his death.

Request for Admission No. 4:

Defendant Cory claims that Howard R. Hughes, Jr., could have only one domicile at death.

Response to Request for Admission No. 4:

Defendant Cory presently believes that under the laws of Texas, California and Nevada, a person may only have one domicile at any one time. Insofar as any of these bodies of law are applicable, therefore, Defendant Cory admits Request No. 4. Defendant Cory can neither admit nor deny this Request should some other body of law be held to be applicable.

Request for Admission No. 5:

Defendant Cory denies that Decedent, Howard R. Hughes, Jr., was domiciled in Nevada at death.

Response to Request for Admission No. 5:

Defendant Cory admits Request No. 5.

Request for Admission No. 6:

Defendant Cory denies that Decedent, Howard R. Hughes, Jr., was domiciled in Texas at death.

Response to Request for Admission No. 6:

Defendant Cory admits Request No. 6.

Request for Admission No. 7:

Defendant Cory claims that the intangible assets of the Estate of Howard R. Hughes, Jr., wherever located, are subject to inheritance taxation under the laws of California, because Hughes was domiciled within the State of California at death.

Response to Request for Admission No. 7:

If Howard R. Hughes, Jr., was domiciled in California at the time of his death, all the intangible assets of the Estate of Howard R. Hughes, Jr., wherever located, would be subject to inheritance taxation under the laws of California. Defendant Cory therefore admits Request No. 7. If Decedent was domiciled without the United States at the time of his death, some or all of the intangible assets of the Estate of Howard R. Hughes, Jr., wherever located, would be subject to inheritance taxation under the laws of California.

Request for Admission No. 8:

The administration of the Estate of Howard R. Hughes, Jr., is pending in the Superior Court of the State of California for the County of Los Angeles, being cause No. 621,359.

Response to Request for Admission No. 8:

Defendant Cory admits Request No. 8.

Request for Admission No. 9:

On September 15, 1976, John A. Woodward, III was appointed Inheritance Tax Referee by the Superior Court of the State of California for the County of Los Angeles for the purpose of appraising the Estate of Howard R. Hughes, Jr., and determining the amount of inheritance tax due the State of California.

Response to Request for Admission No. 9:

Defendant Cory admits Request No. 9.

Request for Admission No. 10:

John A. Woodward, III prepared a Report of Inheritance Tax Referee for the estate of Howard R. Hughes, Jr., and computed the total tax due the State of California upon a finding that Hughes was a domiciliary of the State of California and the County of Los Angeles at death, and included the intangible assets of the estate wherever located.

Response to Request for Admission No. 10:

Defendant Cory admits Request No. 10.

Request for Admission No. 11:

The aforesaid report of the Inheritance Tax Referee has not been filed with the Superior Court because such an action may directly or indirectly come within the proscribed terms of the temporary restraining order rendered by this Court on July 20, 1978.

Response to Request for Admission No. 11:

Defendant Cory admits Request No. 11, except insofar as it may be read to concede that the filing of the Inheritance Tax Referee's Report would directly or indirectly come within the proscribed terms of the Temporary Restraining Order rendered by this Court on July 20, 1978.

Request for Admission No. 12:

The aforesaid Report of Inheritance Tax Referee, when filed with the Superior Court, will serve to commence a proceeding on the issue of the domicile of Howard R. Hughes, Jr., at death.

Response to Request for Admission No. 12:

Defendant Cory admits that the filing of the Inheritance Tax Referee's Report would serve to commence a proceeding by which the California inheritance tax from the Estate of Howard R. Hughes would be fixed. No proceedings specifically on the issue of Hughes' domicile would occur unless Referee Woodward's

claim that Decedent died domiciled in California was controverted by an appropriate party pursuant to California Rev. & Tax Code §14510. Defendant Cory therefore denies the remaining portion of this request.

Request for Admission No. 13:

Since the death of Howard R. Hughes, Jr., Defendant Cory has refused to submit to the jurisdiction of the state courts of Texas or of any other state (except California) in a proceedings which purports to determine the domicile of Hughes at death.

Response to Request for Admission No. 13:

Since the death of Howard R. Hughes, Jr., only one state court has sought to assert jurisdiction over Defendant Cory. on May 5, 1976, Summa Corporation filed an action in the state courts of Delaware, naming Defendant Cory as a defendant. Defendant Cory did not appear in that action. Subsequently, Summa filed a First Amended Complaint in that action dropping Defendant Cory at a defendant therein. Since Defendant Cory did not "refuse to submit to the jurisdiction of the [Delaware] State Courts" but, instead, took no action with regard thereto and has never been asked to submit to the jurisdiction of any other state court, Defendant Cory denies this request for admission.

Request for Admission No. 14:

Defendant Cory claims that he, in his capacity as controller of the State of California, is not bound by the judgment entered on February 15, 1978 in Probate Court No. 2 of Harris County, Texas in Cause No. 139,362, concerning the domicile of Howard R. Hughes, Jr., at death.

Response to Request for Admission No. 14:

Defendant Cory admits Request No. 14.

Request for Admission No. 15:

Defendant Cory claims that the inheritance tax laws of California impose a liability for payment of the inheritance tax upon the heirs at law of a decedent. Therefore, Defendant Cory claims that if the tax cannot be collected from the Estate of Howard R. Hughes, Jr., then he has the right to proceed directly against the heirs at law and levy upon and collect the tax from their personal assets.

Response to Request for Admission No. 15:

Defendant Cory objects to this Request on the ground that it calls for his opinion as to a pure conclusion of law and not a matter of fact or an application of law to fact. The question of the Estate's inability to pay has not yet been presented in a concrete fashion. Therefore, no determination has yet been made by the controller of the circumstances in which he would seek to enforce, or might elect to refrain from enforcing, any such claim for personal liability, even if the same is authorized by law.

Request for Admission No. 16:

If the California courts make a determination that Howard R. Hughes, Jr., was domiciled at death in California, then California inheritance tax law, with respect to intangibles, will not provide for a credit, reduction or other recognition against California inheritance taxes for domicile-based inheritance taxes paid to any other State.

Response to Request for Admission No. 16:

Defendant Cory objects to this Request for Admission on the ground that it calls for a pure conclusion of law and not a matter of fact or an application of law to fact.

Request for Admission No. 17:

Unless restrained from doing so by this Court, Defendant Cory will continue to prosecute his claim to inheritance taxes on the In-

tangible assets of the Estate of Howard R. Hughes, Jr., based on his claim that Hughes was domiciled in California at the time of his death.

Response to Request for Admission No. 17:

Defendant Cory admits Request No. 17.

DATED: June 20, 1979.

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street
Suite 2900
San Francisco, California 94108

Of Counsel:
MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorneys
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, California 90012

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Twelfth Floor
P.O. Box 1148
Austin, Texas 78767
By: DONALD S. THOMAS
Donald Scott Thomas
Attorneys for Defendants Cory and Alvord

[Certificate of Service Omitted in Printing]

Filed June 20, 1979

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

RESPONSES BY DEFENDANT ALVORD TO PLAINTIFFS' REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendant H. B. Alvord, County Treasurer of the County of Los Angeles, hereby responds to the Requests for Admission previously served upon him by Plaintiffs.

Request for Admission No. 1:

Defendant Alvord is a citizen of California.

Response to Request for Admission No. 1:

Defendant Alvord admits Request No. 1 only insofar as he construes it to refer to his personal citizenship as an individual. The Request does not assert that Defendant Alvord is a citizen of California (a) for diversity purposes or (b) in his capacity as an official of the County of Los Angeles and, accordingly, Defendant Alvord neither admits nor denies these assertions.

Request for Admission No. 2:

Defendant Alvord is the duly elected, qualified, and acting County Treasurer for the County of Los Angeles and as such is charged with enforcing the inheritance tax laws of California in a valid, legal manner.

Response to Request for Admission No. 2:

Defendant Alvord admits that he is the duly elected, qualified and acting County Treasurer of the County of Los Angeles. He

objects to the remaining portion of this Request on the ground that it calls for a pure conclusion of law and not a matter of fact or an application of law to fact.

Request for Admission No. 3:

Defendant Alvord claims, and has claimed at all relevant times herein, that Decedent, Howard R. Hughes, Jr., was domiciled in California at death.

Response to Request for Admission No. 3:

Defendant Alvord denies Request No. 3. Defendant Alvord is not charged by law with the functions of asserting California's inheritance tax claims or ascertaining the domicile of decedents.

Request for Admission No. 4:

Defendant Alvord claims that Howard R. Hughes, Jr., could have only one domicile at death.

Response to Request for Admission No. 4:

Defendant Alvord denies Request No. 4. *See* his response to Request No. 3.

Request for Admission No. 5:

Defendant Alvord denies that Decedent, Howard R. Hughes, Jr., was domiciled in Nevada at death.

Response to Request for Admission No. 5:

Defendant Alvord denies Request No. 5. *See* his response to Request No. 3.

Request for Admission No. 6:

Defendant Alvord denies that Decedent, Howard R. Hughes, Jr., was domiciled in Texas at death.

Response to Request for Admission No. 6:

Defendant Alvord denies Request No. 6. *See* his response to Request No. 3.

Request for Admission No. 7:

Defendant Alvord claims that the intangible assets of the Estate of Howard R. Hughes, Jr., wherever located, are subject to inheritance taxation under the laws of California, because Hughes was domiciled within the State of California at death.

Response to Request for Admission No. 7:

Defendant Alvord denies Request No. 7. *See* his response to Request No. 3.

Request for Admission No. 8:

The administration of the Estate of Howard R. Hughes, Jr., is pending in the Superior Court of the State of California for the County of Los Angeles, being cause No. 621, 359.

Response to Request for Admission No. 8:

Defendant Alvord admits Request No. 8.

Request for Admission No. 9:

On September 15, 1976, John A. Woodward, III was appointed Inheritance Tax Referee by the Superior Court of the State of California for the County of Los Angeles for the purpose of appraising the Estate of Howard R. Hughes, Jr., and determining the amount of interitance tax due the State of California.

Response to Request for Admission No. 9:

Defendant Alvord admits Request No. 9.

Request for Admission No. 10:

John A. Woodward, III prepared a Report of Inheritance Tax Referee for the estate of Howard R. Hughes, Jr., and computed the total tax due the State of California upon a finding that Hughes was a domiciliary of the State of California and the County of Los Angeles at death, and included the intangible assets of the estate wherever located.

Response to Request for Admission No. 10:

Defendant Alvord admits Request No. 10.

Request for Admission No. 11:

The aforesaid report of the Inheritance Tax Referee has not been filed with the Superior Court because such an action may directly or indirectly come within the proscribed terms of the temporary restraining order rendered by this Court on July 20, 1978.

Response to Request for Admission No. 11:

Defendant Alvord admits Request No. 11, except insofar as it may be read to concede that the filing of the Inheritance Tax Referee's Report would directly or indirectly come within the proscribed terms of the Temporary Restraining Order rendered by this Court on July 20, 1978.

Request for Admission No. 12:

The aforesaid Report of Inheritance Tax Referee, when filed with the Superior Court, will serve to commence a proceeding on the issue of the domicile of Howard R. Hughes, Jr. at death.

Response to Request for Admission No. 12:

Defendant Alvord admits that the filing of the Inheritance Tax Referee's Report would serve to commence a proceeding by which the California inheritance tax from the Estate of Howard R. Hughes would be fixed and denies the remainder of this Request. No proceedings specifically on the issue of Hughes' domicile would occur unless Referee Woodward's claim that Decedent died domiciled in California was controverted by an appropriate party pursuant to California Rev. & Tax Code § 14510. Defendant Alvord therefore denies the remainder of this Request.

Request for Admission No. 13:

Since the death of Howard R. Hughes, Jr., Defendant Alvord has refused to submit to the jurisdiction of the state courts of Texas or of any other state (except California) in a proceeding which purports to determine the domicile of Hughes at death.

Response to Request for Admission No. 13:

Since the death of Howard R. Hughes, Jr., no state court has sought to assert jurisdiction over Defendant Alvord. Defendant Alvord therefore denies this Request for Admission.

Request for Admission No. 14:

Defendant Alvord claims that he, in his capacity as County Treasurer for the County of Los Angeles, is not bound by the judgment entered on February 15, 1978 in Probate Court No. 2 of Harris County, Texas in Cause No. 139,362, concerning the domicile of Howard R. Hughes, Jr. at death.

Response to Request for Admission No. 14:

Defendant Alvord admits Request No. 14.

Request for Admission No. 15:

Defendant Alvord claims that the inheritance tax laws of California impose a liability for payment of the inheritance tax upon the heirs at law of a decedent. Therefore, Defendant Alvord claims that if the tax cannot be collected from the Estate of Howard R. Hughes, Jr., then he has the right to proceed directly against the heirs at law and levy upon and collect the tax from their personal assets.

Response to Request for Admission No. 15:

Defendant Alvord objects to this Request on the ground that it calls for his opinion as to a pure conclusion of law and not a matter of fact or an application of law to fact.

Request for Admission No. 16:

If the California courts make a determination that Howard R. Hughes, Jr. was domiciled in death in California, then California inheritance tax law, with respect to intangibles, will not provide for a credit, reduction or other recognition against California inheritance taxes for domiciled-based inheritance taxes paid to any other State.

Response to Request for Admission No. 16:

Defendant Alvord objects to this Request for Admission on the ground that it calls for a pure conclusion of law and not a matter of fact or an application of law to fact.

Request for Admission No. 17:

Unless restrained from doing so by this Court, Defendant Alvord will continue to prosecute his claim to inheritance taxes on the intangible assets of the Estate of Howard R. Hughes, Jr., based on his claim that Hughes was domiciled in California at the time of his death.

Response to Request for Admission No. 17:

Defendant Alvord denies Request No. 17. *See* his response to Request No. 3.

DATED: June 20, 1979.

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street
Suite 2900
San Francisco, California 94108

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Twelfth Floor
P. O. Box 1148
Austin, Texas 78767
By: DONALD S. THOMAS
Donald Scott Thomas
Attorneys for Defendants Cory and Alvord

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney

JAMES R. BIRNBERG
Assistant Inheritance Tax Attorneys
Division of Inheritance & Gift Tax
107 South Broadway
Los Angeles, California 90012

[Certificate of Service Omitted in Printing]

Filed July 9, 1979

In the United States District Court
For the Western District of Texas
Austin Division
[Title Omitted in Printing]

ANSWER OF WILLIAM RICE LUMMIS AND FIRST NATIONAL BANK OF NEVADA, NEVADA CO-SPECIAL ADMINISTRATORS OF THE ESTATE OF HOWARD R. HUGHES, JR., DECEASED.

COMES NOW William Rice Lummis and First National Bank of Nevada, Nevada Co-Special Administrators of the Estate of Howard R. Hughes, Jr., Deceased, named as defendants in the above captioned action and make and file this Answer to the Plaintiffs' First Amended Complaint for Interpleader.

ANSWER TO COMPLAINT FOR INTERPLEADER

1. Answering Paragraph No. 1 of Plaintiffs' Complaint:
   Admitted
2. Answering Paragraph No. 2:
   Admitted
3. Answering Paragraph No. 3:
   Admitted
4. Answering Paragraph No. 4:
   Admitted
5. Answering Paragraph No. 5:
   Admitted
6. Answering Paragraph No. 6:
   Admitted
7. Answering Paragraph No. 7:
   Admitted
8. Answering Paragraph No. 8:
   Admitted
9. Answering Paragraph No. 9:
   Admitted

10. Answering Paragraph No. 10:
Admitted

11. Answering Paragraph No. 11:
Admitted

12. Answering Paragraph No. 12:
Admitted

13. Answering Paragraph No. 13:
Admitted

14. Answering Paragraph No. 14:
Admitted

15(a)(i) Answering Paragraph No. 15(a)(i):
Admitted

15(a)(ii) Answering Paragraph No. 15(a)(ii):
Admitted
The Nevada Co-Special Administrators at all relevant times herein have asserted and continue to assert that Howard R. Hughes, Jr. ("Decedent"), was domiciled in Nevada at death. A duty is therefore imposed upon all other administrators after paying just debts, to remit all of the intangible assets of the Estate to the Nevada Co-Special Administrators.

15(a)(iii) Answering Paragraph No. 15(a)(iii):
Admitted

15(b) Answering Paragraph No. 15(b):
Admitted

15(c) Answering Paragraph No. 15(c):
Admitted

16. Answering Paragraph No. 16:
Admitted

17. Answering Paragraph No. 17:
Admitted

18. Answering Paragraph No. 18: Admitted
19. Answering Paragraph No. 19: Admitted
20. Answering Paragraph No. 20: Admitted
21. Answering Paragraph No. 21: Admitted
22. Answering Paragraph No. 22: Admitted

23(a) Answering Paragraph No. 23(a): Admitted

23(b) Answering Paragraph No. 23(b): Admitted

24. Answering Paragraph No. 24: Admitted
25. Answering Paragraph No. 25: Admitted
26. Answering Paragraph No. 26: Admitted
27. Answering Paragraph No. 27: Admitted
28. Answering Paragraph No. 28: Admitted
29. Answering Paragraph No. 29: Admitted
30. Answering Paragraph No. 30: Admitted
31. Answering Paragraph No. 31: Admitted
32. Answering Paragraph No. 32: Admitted

33. Answering Paragraph No. 33:
Admitted
34. Answering Paragraph No. 34:
Admitted
35. Answering Paragraph No. 35:
Admitted
36. Answering Paragraph No. 36:
Admitted

Further, the Nevada Co-Special Administrators pledge and assert that they will abide by a judgment of this Court in this action.

37. Answering Paragraph No. 37:
Admitted
38. Answering Paragraph No. 38:
Admitted
39. Answering Paragraph No. 39:
Admitted
40. Answering Paragraph No. 40:
Admitted
41. Answering Paragraph No. 41:
Admitted
42. Answering Paragraph No. 42:
Admitted
43. Answering Paragraph No. 43:
Admitted
44. Answering Paragraph No. 44:
Admitted
45. Answering Paragraph No. 45:
Admitted
46. Answering Paragraph No. 46:
Admitted
47. Answering Paragraph No. 47:
Admitted

WHEREFORE, PREMISES CONSIDERED, Defendants, William Rice Lummis and First National Bank of Nevada, Nevada Co-Special Administrators of the Estate of Howard R. Hughes, Jr., Deceased, pray that this Court:

1. Adjudge and declare that Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death, and that all parties to this action abide by that declaration.
2. In the alternative, should the Court determine that Decedent was domiciled in a jurisdiction other than Nevada, then adjudge and declare in which other jurisdiction Decedent was domiciled at the time of his death and further adjudge and declare that he was domiciled only in that jurisdiction at the time of his death and that all parties to this action abide by that declaration.
3. Grant Defendants, William Rice Lummis and First National Bank of Nevada, Nevada Co-Special Administrators of the Estate of Howard R. Hughes, Jr., Deceased, all other and further relief to which entitlement is shown.

Respectfully submitted,

BROWN, MARONEY, ROSE, BAKER & BARBER
1300 American Bank Tower
Austin, Texas 78701

By CHARLIE D. DYE
Attorney of Record for Defendants
William Rice Lummis and
First National Bank of Nevada

[Certificate of Service Omitted in Printing]

Filed July 9, 1979

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

ANSWER OF WILLIAM RICE LUMMIS, LOUISIANA PROVISIONAL ADMINISTRATOR OF THE ESTATE OF HOWARD R. HUGHES, JR., DECEASED

COMES NOW William Rice Lummis, Louisiana Provisional Administrator of the Estate of Howard R. Hughes, Jr., Deceased, named as defendant in the above captioned action, and makes and files this Answer to the Plaintiffs' First Amended Complaint for Interpleader.

ANSWER TO COMPLAINT FOR INTERPLEADER

1. Answering Paragraph No. 1 of Plaintiffs' Complaint:
   Admitted
2. Answering Paragraph No. 2:
   Admitted
3. Answering Paragraph No. 3:
   Admitted
4. Answering Paragraph No. 4:
   Admitted
5. Answering Paragraph No. 5:
   Admitted
6. Answering Paragraph No. 6:
   Admitted
7. Answering Paragraph No. 7:
   Admitted
8. Answering Paragraph No. 8:
   Admitted
9. Answering Paragraph No. 9:
   Admitted

10. Answering Paragraph No. 10:
Admitted

11. Answering Paragraph No. 11:
Admitted

12. Answering Paragraph No. 12:
Admitted

13. Answering Paragraph No. 13:
Admitted

14. Answering Paragraph No. 14:
Admitted

15(a)(i) Answering Paragraph No. 15(a)(i):
Admitted

15(a)(ii) Answering Paragraph No. 15(a)(ii):
Admitted
The Louisiana Provisional Administrator at all relevant times herein has asserted and continues to assert that Howard R. Hughes, Jr., ("Decedent"), was domiciled in Nevada at death.

15(a)(iii) Answering Paragraph 15(a)(iii):
Admitted

15(b) Answering Paragraph No. 15(b):
Admitted

15(c) Answering Paragraph No. 15(c):
Admitted

16. Answering Paragraph No. 16:
Admitted

17. Answering Paragraph No. 17:
Admitted

18. Answering Paragraph No. 18:
Admitted

19. Answering Paragraph No. 19:
Admitted

20. Answering Paragraph No. 20:
Admitted
21. Answering Paragraph No. 21:
Admitted
22. Answering Paragraph No. 22:
Admitted
23(a) Answering Paragraph No. 23(a):
Admitted
23(b) Answering Paragraph No. 23(b):
Admitted
24. Answering Paragraph No. 24:
Admitted
25. Answering Paragraph No. 25:
Admitted
26. Answering Paragraph No. 26:
Admitted
27. Answering Paragraph No. 27:
Admitted
28. Answering Paragraph No. 28:
Admitted
29. Answering Paragraph No. 29:
Admitted
30. Answering Paragraph No. 30:
Admitted
31. Answering Paragraph No. 31:
Admitted
32. Answering Paragraph No. 32:
Admitted
33. Answering Paragraph No. 33:
Admitted
34. Answering Paragraph No. 34:
Admitted

35. Answering Paragraph No. 35:
Admitted

36. Answering Paragraph No. 36:
Admitted

Further, the Louisiana Provisional Administrator pledges and asserts that he will abide by a judgment of this court in this action.

37. Answering Paragraph No. 37:
Admitted

38. Answering Paragraph No. 38:
Admitted

39. Answering Paragraph No. 39:
Admitted

40. Answering Paragraph No. 40:
Admitted

41. Answering Paragraph No. 41:
Admitted

42. Answering Paragraph No. 42:
Admitted

43. Answering Paragraph No. 43:
Admitted

44. Answering Paragraph No. 43:
Admitted

45. Answering Paragraph No. 45:
Admitted

46. Answering Paragraph 46:
Admitted

47. Answering Paragraph No. 47:
Admitted

WHEREFORE, PREMISES CONSIDERED, Defendant, William Rice Lummis, Louisiana Provisional Administrator of the Estate of Howard R. Hughes, Jr., Deceased, prays that this Court:

1. Adjudge and declare that Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death, and that all parties to this action abide by that declaration.
2. In the alternative, should the Court determine that Decedent was domiciled in a jurisdiction other than Nevada, then adjudge and declare in which other jurisdiction Decedent was domiciled at the time of his death and further adjudge and declare that he was domiciled only in that jurisdiction at the time of his death and that all parties to this action abide by that declaration.
3. Grant Defendant William Rice Lummis, Louisiana Provisional Administrator of the Estate of Howard R. Hughes, Jr., Deceased, all other and further relief to which entitlement is shown.

Respectfully submitted,

BROWN, MARONEY, ROSE, BAKER & BARBER
1300 AmericanBank Tower
Austin, Texas 78701

By CHARLIE D. DYE
Attorney of Record for
Defendant William Rice Lummis

[Certificate of Service Omitted in Printing]

Filed July 9, 1979

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

ANSWER OF WILLIAM RICE LUMMIS, DELAWARE ANCILLARY ADMINISTRATOR OF THE ESTATE OF HOWARD R. HUGHES, JR., DECEASED

COMES NOW William Rice Lummis, Delaware Ancillary Administrator of the Estate of Howard R. Hughes, Jr., Deceased, named as defendant in the above captioned action and makes and files this Answer to the Plaintiffs' First Amended Complaint for Interpleader.

ANSWER TO COMPLAINT FOR INTERPLEADER

1. Answering Paragraph No. 1 of Plaintiffs' Complaint:
   Admitted
2. Answering Paragraph No. 2:
   Admitted
3. Answering Paragraph No. 3:
   Admitted
4. Answering Paragraph No. 4:
   Admitted
5. Answering Paragraph No. 5:
   Admitted
6. Answering Paragraph No. 6:
   Admitted
7. Answering Paragraph No. 7:
   Admitted
8. Answering Paragraph No. 8:
   Admitted
9. Answering Paragraph No. 9:
   Admitted

10. Answering Paragraph No. 10:
Admitted
11. Answering Paragraph No. 11:
Admitted
12. Answering Paragraph No. 12:
Admitted
13. Answering Paragraph No. 13:
Admitted
14. Answering Paragraph No. 14:
Admitted

15(a)(i) Answering Paragraph No. 15 (a)(i):
Admitted

15(a)(ii) Answering Paragraph No. 15(a)(ii):
Admitted

The Delaware Ancillary Administrator at all relevant times herein has asserted and continues to assert that Howard R. Hughes, Jr. ("Decedent") was domiciled in Nevada at death.

15(a)(iii) Answering Paragraph No. 15(a)(iii):
Admitted

15(b) Answering Paragraph No. 15(b):
Admitted

15(c) Answering Paragraph No. 15(c):
Admitted

16. Answering Paragraph No. 16:
Admitted
17. Answering Paragraph No. 17:
Admitted
18. Answering Paragraph No. 18:
Admitted
19. Answering Paragraph No. 19:
Admitted
20. Answering Paragraph No. 20:
Admitted

21. Answering Paragraph No. 21:
Admitted

22. Answering Paragraph No. 22:
Admitted

23(a) Answering Paragraph No. 23(a):
Admitted

23(b) Answering Paragraph 23(b):
Admitted

24. Answering Paragraph No. 24:
Admitted

25. Answering Paragraph No. 25:
Admitted

26. Answering Paragraph No. 26:
Admitted

27. Answering Paragraph No. 27:
Admitted

28. Answering Paragraph No. 28:
Admitted

29. Answering Paragraph No. 29:
Admitted

30. Answering Paragraph No. 30:
Admitted

31. Answering Paragraph No. 31:
Admitted

32. Answering Paragraph No. 32:
Admitted

33. Answering Paragraph No. 33:
Admitted

34. Answering Paragraph No. 34:
Admitted

35. Answering Paragraph No. 35:
Admitted

36. Answering Paragraph No. 36:
Admitted

    Further, the Delaware Ancillary Administrator pledges and asserts that he will abide by a judgment of the court in this action.

37. Answering Paragraph No. 37:
Admitted
38. Answering Paragraph No. 38:
Admitted
39. Answering Paragraph No. 39:
Admitted
40. Answering Paragraph No. 40:
Admitted
41. Answering Paragraph No. 41:
Admitted
42. Answering Paragraph No. 42.:
Admitted
43. Answering Paragraph No. 43:
Admitted
44. Answering Paragraph No. 44:
Admitted
45. Answering Paragraph No. 45:
Admitted

    In the face of conflicting state court judgments the Delaware Administrator cannot comply with the Delaware statutory requirement of obtaining a final accounting and transferring ownership of the intangible assets to the domiciliary administrator.

46. Answering Paragraph No. 46:
Admitted
47. Answering Paragraph No. 47:
Admitted

WHEREFORE, PREMISES CONSIDERED, Defendant William Rice Lummis, Delaware Ancillary Administrator of the Estate of Howard R. Hughes, Jr., Deceased, prays that this Court:

1. Adjudge and declare that the Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death, and that all parties to this action abide by that decision.
2. In the alternative, should the Court determine that Decedent was domiciled in a jurisdiction other than Nevada, then adjudge and declare in which other jurisdiction Decedent was domiciled at the time of his death and further adjudge and declare that he was domiciled only in that jurisdiction at the time of his death and that all parties to this action abide by that declaration.
3. Grant Defendant William Rice Lummis, Delaware Ancillary Administrator of the Estate of Howard R. Hughes, Jr., Deceased, all other and further relief to which entitlement is shown.

Respectfully submitted,

BROWN, MARONEY, ROSE, BAKER & BARBER
1300 AmericanBank Tower
Austin, Texas 78701

By CHARLIE D. DYE
Charlie D. Dye
Attorney of Record for
Defendant William Rice
Lummis

[Certificate of Service Omitted in Printing]

Filed July 10, 1979

In the United States District Court
For the Western District of Texas
Austin Division

[Title Omitted in Printing]

ANSWER OF RICHARD GANO, CALIFORNIA GENERAL ADMINISTRATOR OF THE ESTATE OF HOWARD R. HUGHES, JR., DECEASED

COMES NOW Richard Gano, California General Administrator of the Estate of Howard R. Hughes, Jr., Deceased, named as a defendant in the above captioned action and makes and files this Answer to the Plaintiffs' First Amended Complaint for Interpleader.

ANSWER TO COMPLAINT FOR INTERPLEADER

1. Answering Paragraph No. 1 of Plaintiffs' Complaint: Admitted
2. Answering Paragraph No. 2: Admitted
3. Answering Paragraph No. 3: Admitted
4. Answering Paragraph No. 4: Admitted
5. Answering Paragraph No. 5: Admitted
6. Answering Paragraph No. 6: Admitted
7. Answering Paragraph No. 7: Admitted
8. Answering Paragraph No. 8: Admitted

9. Answering Paragraph No. 9:
Admitted

10. Answering Paragraph No. 10:
Admitted

11. Answering Paragraph No. 11:
Admitted

12. Answering Paragraph No. 12:
Admitted

13. Answering Paragraph No. 13:
Admitted

14. Answering Paragraph No. 14:
Admitted

15(a)(i) Answering Paragraph No. 15 (a)(i):
Admitted

15(a)(ii) Answering Paragraph No. 15(a)(ii):
Admitted
The California General Administrator at all relevant times herein has asserted and continues to assert that Howard R. Hughes, Jr. ("Decedent") was domiciled in Nevada at death.

15(a)(iii) Answering Paragraph No. 15(a)(iii):
Admitted

15(b) Answering Paragraph No. 15(b):
Admitted

15(c) Answering Paragraph No. 15(c):
Admitted

16. Answering Paragraph No. 16:
Admitted

17. Answering Paragraph No. 17:
Admitted

18. Answering Paragraph No. 18:
Admitted

19. Answering Paragraph No. 19:
Admitted

20. Answering Paragraph No. 20:
Admitted
21. Answering Paragraph No. 21:
Admitted
22. Answering Paragraph No. 22:
Admitted
23(a) Answering Paragraph No. 23(a):
Admitted
23(b) Answering Paragraph 23(b):
Admitted
24. Answering Paragraph No. 24:
Admitted
25. Answering Paragraph No. 25:
Admitted
26. Answering Paragraph No. 26:
Admitted
27. Answering Paragraph No. 27:
Admitted
28. Answering Paragraph No. 28:
Admitted
29. Answering Paragraph No. 29:
Admitted
30. Answering Paragraph No. 30:
Admitted
31. Answering Paragraph No. 31:
Admitted
32. Answering Paragraph No. 32:
Admitted
33. Answering Paragraph No. 33:
Admitted
34. Answering Paragraph No. 34:
Admitted
35. Answering Paragraph No. 35:
Admitted

36. Answering Paragraph No. 36:
Admitted

    Further, the California General Administrator pledges and asserts that he will abide by a judgment of this court in this action.

37. Answering Paragraph No. 37:
Admitted
38. Answering Paragraph No. 38:
Admitted
39. Answering Paragraph No. 39:
Admitted
40. Answering Paragraph No. 40:
Admitted
41. Answering Paragraph No. 41:
Admitted
42. Answering Paragraph No. 42.:
Admitted
43. Answering Paragraph No. 43:
Admitted
44. Answering Paragraph No. 44:
Admitted
45. Answering Paragraph No. 45:
Admitted
46. Answering Paragraph No. 46:
Admitted
47. Answering Paragraph No. 47:
Admitted

WHEREFORE, PREMISES CONSIDERED, Defendant Richard Gano, California General Administrator of the Estate of Howard R. Hughes, Jr., Deceased, prays that this Court:

1. Adjudge and declare that Decedent was domiciled in Nevada, and therefore not in any other jurisdiction, at the time of his death, and that all parties to this action abide by that declaration.
2. In the alternative, should the Court determine that Decedent was domiciled in a jurisdiction other than Nevada, then adjudge and declare in which other jurisdiction Decedent was domiciled at the time of his death and further adjudge and declare that he was domiciled only in that jurisdiction at the time of his death and that all parties to this action abide by that declaration.
3. Grant Defendant Richard Gano, California General Administrator of the Estate of Howard R. Hughes, Jr., Deceased, all other and further relief to which entitlement is shown.

Respectfully submitted,

RONALD GOTHER
GIBSON, DUNN & CRUTCHER
515 South Flower Street
Los Angeles, California 90071

BROWN, MARONEY, ROSE, BAKER & BARBER
1300 American Bank Tower
Austin, Texas 78701

By CHARLIE D. DYE
Charlie D. Dye
Attorneys of Record for Defendant Richard Gano

Testimony of William Rice Lummis at the hearing on Defendants' Motions to Dismiss and Plaintiffs' Motion In Preliminary Injunction, July 10, 1979.

[7] WILLIAM LUMMIS,

having been called as a witness by the Plaintiffs, and [8] having been by the Court first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. LILIENSTERN:

Q What is your name and full address, Mr. Lummis?

A William R. Lummis. My address is 4045 South Spencer, Las Vegas, Nevada.

Q Mr. Lummis, in what capacities do you represent or are you serving as a personal representative of the Howard Hughes estate?

A I serve as temporary co-administrator of the Hughes estate in Texas, as co-special administrator of the estate of Nevada, as ancillary administrator of the estate of Delaware and as provisional administrator of the estate of Louisiana.

Q And who is Mrs. Annette Gano Lummis who is another Texas co-administrator who is also a plaintiff in this action?

A She is my Mother.

Q What was Mrs. Lummis' relationship to Howard Hughes, the decedent?

A My Mother was Mr. Hughes' aunt.

Q Did Mr. Hughes, at the time of his death, have any children or brothers or sisters living?

A No, he did not.

Q Were there any other uncles or aunts other than your [9] mother?

A None survived him.

Q None survived him. Would you describe for the Court, Mr. Lummis, the nature of the intangible assets which are the subject of this action, this interpleader action, which we've brought in this federal district court?

A The intangible assets of the Hughes estate comprise, I would estimate, approximately 99 percent of the estate and they consist principally of all of the stock of the Summa Corporation, which is a Delaware corporation, all of the stock of Hughes Properties, Inc., which was formerly Hughes Television Network, Inc., which is a Nevada corporation. And the other principal intangible asset would be the 22 percent interest which Mr. Hughes held individually in Hughes Air Corp, which is known as Hughes Airwest, the airline.

Q Who owns the other 78 percent of Hughes Air Corp?

A Summa Corporation.

Q What, if any, of these intangible assets are located within the State of Texas?

A Located within Texas is the stock of Hughes Properties, Inc. and the 22 percent of the stock held by Mr. Hughes individually at the time of his death.

Q All right. Where does your mother reside? In what state?

A In Texas.

[10] Q Do you know Richard Gano, the California General administrator of the estate?

A I do.

Q In what state does he reside?

A He resides in California.

Q You have a co-special administrator in the State of Nevada; do you not?

A Yes.

Q What entity is that?

A First National Bank of Nevada.

Q Whose principal place of business is where?

A Reno.

Q Reno, Nevada?

A Yes.

Q You're familiar, are you not, Mr. Lummis, with the domicile trial, the domicile case, which was tried in Probate Court Number Two of Harris County, Texas, during the latter part of 1977 and early 1978?

A I am indeed.

Q You were a party to that action, were you not?

A Yes.

Q To your knowledge, was Mr. Cory or Mr. Alvord, as we've come to call them, the California Defendants; were either of those gentlemen parties to that action?

A They were not.

[11] Q Are you familiar with an appearance made by Mr. Bullock in the State of Delaware in the proceeding there?

A Yes.

Q To your knowledge, did Mr. Cory or Mr. Alvord make appearances in that proceeding?

A To my knowledge, they did not.

Q What is that proceeding, Mr. Lummis, the action pending in Delaware?

A The action pending in Delaware was an interpleader action filed by Summa Corporation to—or requesting the Court to identify the person they should look to as the shareholder of Summa Corporation pending a final determination of the administration of the estate entitled to administer the Summa stock.

Q And what determination did the Court make as an interim measure as to the shareholder of Summa Corporation?

A The Court issued an order instructing Summa Corporation to recognize as its sole shareholder the Delaware ancillary administrator for purposes of administering the Summa shares.

Q All right. Are you familiar with the probate proceedings in the State of Nevada?

A Yes.

Q To your knowledge, has the State of Texas, by and through its then Attorney General John Hill, made an [12] appearance in that proceedings [sic]?

A Yes.

Q To your knowledge, have either Mr. Cory or Mr. Alvord made appearances in the Nevada proceedings, probate proceedings?

A To my knowledge, they have not.

Q Is the issue of domicile still pending in both Delaware and Nevada?

A Yes.

Q There had been no determination by either of those Courts concerning Mr. Hughes' domicile at death?

A There has not been.

Q Have you put together some cost figures concerning the fee for services paid to attorneys including out-of-pocket expenses for the cost of the pretrial and trial of the domicile case in Probate Court Number Two of Harris County, Texas?

A Yes, I have some approximate figures.

Q What are those figures, Mr. Lummis?

A The legal fees and expenses incurred by the estate in connection with the Texas domicile trial approximated $1,700,000.00.

Q In your capacity as Delaware administrator, what—what action would you take in the face of conflicting domicile determinations by other state courts? What would be your posture when presented with a judgment, say, from Texas, [13] California and Nevada, some of which may not all recognize the same state of domicile?

A Well, the Delaware administrator would have to seek, I assume in Delaware, a determination of Hughes' domicile independent of the findings in the other states.

Q And, Mr. Lummis, have all of the administrators of the various proceedings in which administrations have been opened with respect to the estate, entered appearances in this action?

A They have.

Q Finally, Mr. Lummis, have you, at our request, computed various tax figures based upon information which you have been provided as administrator of the estate?

A Yes. I have prepared what I would describe as my best estimation as an administrator as to what various tax results would be.

Q All right. Would you tell us what jurisdictions you're dealing with in making your computations?

A Well, my computations were made to determine what the overall tax liability of the Hughes estate might be if it came to pass that both Texas and California were able to assert independently inheritance taxes against the Hughes estate.

Q All right. Have you been provided figures—or has the State been provided figures by the Internal Revenue [14] Service concerning its valuation of the gross estate?

A I've been informed as to its provisional number.

Q Yes, sir.

A Yes, sir.

Q And what is that number, Mr. Lummis?

A $465,000,000.00 is the number the Internal Revenue Service has determined to be the value of the Hughes gross estate at the valuation date, which was October 5, 1976.

Q All right. I know that you have some written computations and I suggest perhaps—Do you have those at the stand with you?

A Yes.

Q Okay. You might want to refer to those as I ask you some of these questions. Have you made a computation concerning the value of the net taxable estate, that is, deducting expenses of the administration and other allowable deductions from that federal gross estate tax figure?

A Yes.

Q And what is that figure of the taxable estate?

A I have assumed throughout that there would be allowed as deductions for known debts and clearly identified deductions of the estate, $77,000,000.00, which yields a taxable estate of approximately $388,000,000.00.

Q All right. Mr. Lummis, we provided the Court with an instrument which is captioned, a Notice of Judicial [15] Notice and for Application of Law. But let me ask you to assume, if you would, sir, that the federal tax rate in 1976 was approximately 77 percent. For purposes of your computations, is that the figure you used?

A Yes.

Q And applying that to the taxable estate, what is the amount of net tax due the federal government based upon their assessed [16] valuation?

A The gross tax due based on 77 percent rate would be $321,000,000.00, approximately. But the administrators have claimed, in the federal estate tax return, a credit for whatever state death tax might be paid, the maximum credit or 16 percent, and assuming that a state death tax credit would be allowable against the federal estate tax, I have arrived at a net federal estate tax of approximately $254,300,000.00.

Q And does that include certain interest which would have to be paid on the net amount of the tax due?

A Yes, it does.

Q Calculated at what rate?

A Calculated at a waive [sic] average of 7 percent over a six-year period.

Q All right. Now, in making your computations—We have no figures from the Texas Comptroller's Office; is that correct? That is, they have not provided us with their valuation?

A That's correct.

Q Did you, in making your computations, assume a figure equal to the federal assessed valuation in computing the Texas tax due?

A Yes. I had to assume some value. And I assume the State of Texas would, for the purposes of these computations, would abide by the valuation of the Internal Revenue Service.

Q All right. And what amount of taxes due the State of Texas, based upon its tax rate, did you arrive at?

A I arrived at a tax, principal tax of $62,000,000.00, approximately. And a total tax applying to deferred payment scheduled at the rate of six percent, which is provided by the Texas Statutes over a six-year period of deferred payment, arrived at interest charges of some $22,300,000.00, or a total payment to the State of Texas with respect to the inheritance tax of some $84,300,000.00.

Q All right. And you've examined the inheritance tax referee's report which has been admitted as an exhibit and

was previously filed as an attachment to an affidavit in this action, have you not?

A The California—

Q Yes, sir.

A Yes, I have.

[17] Q And have you made certain computations with respect to the inheritance tax referee's assessed valuation of the estate?

A Yes, I have.

Q And what amount of taxes did you compute as due and owing, accepting his figures and applying the 24 percent, approximately 24 percent tax rate did you arrive at?

A Well, the inheritance tax referee of California, his report indicated that he would assert the value of the Hughes estate to be, the gross value of the estate to be $1,106,345,516.00. His report indicated no reductions. It's simply related to the gross value of the estates. I have assumed, once again, the administrators would be able to sustain deductions of some $77,000,000.00, so my numbers are based on a taxable, an assumed taxable estate of the California of a $1,029,000,000.00, in round numbers.

Q All right.

A The tax rate in California is 24 percent. I've used that number to arrive at a principal tax of $247,000,000.00. The interest rate charged in California for past-due taxes is 12 percent per annum. And again, being consistent with my earlier computations over a six-year period, that number comes to a $177,800,000.00. So, the total payments that would be due California, under the assumptions that I have made in arriving at my working numbers, those total—that total obligation would be $424,800,000.00.

[18] Q All right. And again, your computations accepted for purposes of your computations the assessed values placed on the estate by the Internal Revenue Service[,] an assumption that Texas would abide by that same computation and the California inheritance tax referee's figure?

A That is correct.

Q As representative of the estate, do you agree or disagree with those valuations by the IRS and the inheritance tax referee?

A Well, I would certainly disagree strenuously with the—with both valuations. The administrators determine the Hughes estate to have a gross value of a $166,800,000.00, somewhat less than either the valuations placed upon the estate by the Internal Revenue Service and much less than that placed or indicated by the inheritance tax referee of California.

Q All right. Finally, in your computations have you totaled those showing the total amount of tax due and owing by the estate?

A Yes. Again, to arrive at what a working number might be, to define the extent of the problem that might confront the administrators if both Texas and California did assert, were able and permitted to assert their inheritance tax, the total tax liability of the estate, death tax liability of the estate, to say nothing of the taxes that might be [19] incurred in attempting to raise those sums, but the death tax liability alone would be $763,400,000.00.

Q As compared, again, to a gross estate value by the Internal Revenue Service of what amount?

A Of $465,000,000.00 and a gross estate value of administrators of a $166,800,000.00.

Q Thank you, Mr. Lummis.

MR. LILIENSTERN: I pass the witness, your Honor.

CROSS EXAMINATION

QUESTIONS BY MR. MAYER:

Q Mr. Lummis, have you made similar calculations for what the California taxes would be if the California inheritance tax referee had valued the estate at the same amount that the IRS values the estate at?

A No.

Q No?

A I had no reason to assume that the California inheritance tax referee on the basis of the number that I sought would be interested in adopting the numbers of the Internal Revenue Service.

Q The issue of valuation of California is, of course, subject to judicial determination; is it not?

A It's my understanding, yes.

Q Mr. Lummis, I want to read to you, if I may, a statement [20] from the Plaintiffs' memorandum in opposition to our motion to dismiss, which refers to, quote, the fact that the defendant administrators and the plaintiff administrators are acting in unison toward a common goal; is that a correct statement?

MR. LILIENSTERN: May we have a citation, Counsel?

MR. MAYER: Yes, it's page 27, and there are no lines, but it's the first two lines of the second full paragraph on that page.

Q (By Mr. Mayer) Do you want me to read that again?

A Please do.

Q Okay. I'll read the whole sentence just for purposes of clarity. "By the same token, the fact that the defendant administrators and the plaintiff administrators are acting in unison toward a common goal does not negate the adversity between their claims and those of the defendant taxing officials." My question is: Is it correct that the defendant administrators and the plaintiff administrators are working—Pardon.—are acting in unison toward a common goal?

A That is correct.

Q At whose direction are the various administrators acting under?

A The administrators are—have reached their own decisions.

[21] Q How can they therefore be acting in unison? Would not someone have to stake out a course for all the administrators to follow?

A Well, all of the administrators have jointly arrived at the conclusion that that would be very beneficial to this

estate were we able to have a unitary determination of the domicile of Mr. Hughes. And certainly to that extent the administrators are acting in unison toward a common goal if that's—

Q Can you—Are there any examples you can think of where the various administrators have not been acting in unison and have taken opposing positions?

A No, they have not. They have attempted to work together in effecting an orderly administration of a fairly disorderly estate.

Q And who is the central decision maker between the various administrators?

A The administrators have all indicated earlier to make up their own minds about these matters. I assume that you could say that I am the principal administrator of the estate.

Q Is there any occasion on which the California special administrator has taken a position that differs from the position that you have taken in your capacity as administrator in the other jurisdictions?

[22] A No. On the other hand, I certainly do not presume to instruct the California administrator in any way.

Q Do you recall when the Texas estate was opened, Mr. Lummis?

A Yes, I do. April 14, 1976.

Q And when was the Nevada estate opened?

A April 14, 1976.

Q And the California estate?

A April 14, 1976.

Q Was that all done as part of a unified scheme of administration?

A Yes, it was a unified plan to open an administration of the estate of Mr. Hughes.

Q And who originated that plan?

A My mother and I and our attorney and the attorneys for Summa Corporation and other people interested in the orderly administration of the Hughes estate.

Q Do you know whether the California administrator has taken any position regarding the administration of that estate without checking with you and your attorney?

A No. I believe that in the actions that the California administrator takes, he, as a matter of information and as a matter of coordinating this information, informs me and my attorneys of the proposed action to be taken. I, likewise, inform him of actions that I taken [sic] in my administrations which I serve.

[23] Q Where—When did you become aware, Mr. Lummis, that California might have a tax claim against the Hughes estate?

A I don't recall.

Q Would—If I suggested to you that it was in the latter—it was in October or September, 1977, would that refresh your recollection?

A I really don't recall, but I wouldn't quarrel with that.

Q Do you—Do you recall whether California had expressed an interest in taxing the Hughes estate before the Texas domicile trial started in Houston?

A Yes, they did.

Q To your knowledge, were any of the constitutional claims that the estate has now raised in its complaint, that the plaintiffs now raise in their complaint, raised in the Texas State Court?

A I don't know. There are many pleadings, you understand, filed in my behalf that I'm not—I don't recall the specifics of.

Q Are you aware that the heirs have entered into a series of settlement agreements, or persons that claim to be heirs have entered into a series of settlement agreements?

A Yes.

Q And do those settlement agreements divide up the estate regardless of which jurisdiction is ultimately found to [24] be the domicile?

A They purport to do that on the assumption and only in the event that Mr. Hughes died intestate.

Q And is it not correct that those agreements also provide that if one of the heirs pays a disproportionate share of the tax that he or she may obtain reimbursement from the other heirs?

A I don't recall. I have not looked at those agreements for eighteen months or more.

MR. MAYER: Why don't I pass the witness while I refer to the appropriate paragraph?

CROSS EXAMINATION

QUESTIONS BY MR. HARRISON:

MR. HARRISON: Your Honor, if I may, because it will be in aid of my cross examination of Mr. Lummis, I would like at this time to offer into evidence a series of documents that have been marked T-1 through T-5, and they—There is a joint motion by all parties here to approve these documents and to the effect that they may be offered into evidence. And I offer them into evidence at this time.

MR. GEORGE: No objection, your Honor.

MR. MAYER: No objection.

THE COURT: They are admitted.

(Whereupon, at this time, [25] Exhibits T-1 through T-5 were admitted into evidence.)

MR. HARRISON: May I proceed, your Honor?

Q (By Mr. Harrison) Mr. Lummis, you are also a licensed attorney, are you not?

A Yes, I am.

Q In what states?

A Texas.

Q All right, sir. When you were asked on direct examination about appearances made by Mr. Bullock or by the Attorney General of Texas in respective states of Delaware and Nevada, you didn't mean by your testimony, did you, to ascribe any legal significance to the term, appearance, did you?

A Well, I simply meant to—what I stated. And that is my understanding. That they filed appearances. Mr. Bullock filed an appearance in Delaware and Mr. Hill, as I recall, on behalf of Mr. Bullock in Nevada made an appearance.

Q All right. Have you ever seen any of the pleadings?

A I'm sure I have.

Q All right, sir. Then, if you've seen them, I assume you recall that the document filed on behalf of Mr. Bullock in Delaware was a plea of jurisdiction filed in a state and, of

course, this Court can and does take judicial [26] knowledge of the law of Delaware that it is a pure federal rule state and allows the filing of a plea of jurisdiction without there being a connotation of an appearance for general purposes. Are you aware of that?

A No. I did not attempt in my testimony to describe the legal effect of these appearances.

Q All right. That's what I was getting at. You know that papers were filed by the State of Texas in those two jurisdictions and that's all you're testifying to; is that correct?

A That's correct.

Q Are you familiar also with the fact, Mr. Lummis, that Mr. Bullock's office has worked along and within a cooperative mode with the Internal Revenue Service in the appraisal that's been ongoing on your estate?

A Yes, I am.

Q And that the Texas Comptroller has worked with the IRS since the inception of the IRS appraisal; is that not correct?

A Yes, early on.

Q And did the State of California enter into and work with the IRS in the same fashion in which the Texas Comptroller has?

A I'm not sure I can answer that question. Most of those communications have really gone through my term.

[27] Q All right, sir.

A I'm not personally familiar with the level of cooperation.

Q All right. When you speak of this one point, one or two point billion dollar assessment initially issued by the California inheritance tax referee, do you know whether or not that's been based upon an actual appraisal of the estate of Howard Hughes?

A I do not know.

Q All right, sir.

A But—

Q And you have testified that you yourself seriously disagree with this 1.2 billion dollar evaluation?

A I certainly do.

Q Mr. Lummis, is the nature of the estate that you administer wherever its assets are situated, tangible or intangible, are the assets in a sense of securities and so forth that are of aesthetic value or do you administer income producing properties?

A Well, these assets are certainly not aesthetic. They are—Some of the assets are passive, but their values certainly fluctuate and many of the assets involve operating companies and operating business lines within companies.

Q What is the last complete fiscal year in which the companies which make up your estate essentially have filed a federal income tax return?

[28] A The—I'm not sure about the income tax return. Whether or not—that may be 1977—

Q Where it's '77—

A Yes, sir. It may be '77. Now, if you're at—If your question relates to audited financial statements, that would be December, 1978.

Q Well, I believe that either you or one of your chief financial officers were quoted in the New York Times recently as stating that Summa Corporation had, or the estate, and please correct me as to which it is, had enjoyed some $37,000,000.00 before tax profit in its last fiscal year?

A Summa Corporation had before tax profit in 1978, $31,000,000.00.

Q All right, sir. And do you anticipate, of course, the vagaries of the Commerce being what it is that Summa will be a profitable entity in the future?

A We certainly hope so and we're doing our best to make it so and keep it so, but—We also recognize the vagaries of—

Q All right.

A —of the operations of these companies.

Q So, with the payouts provided by the various states and the federal government for these death taxes that are being asserted against your estate not only do you have [29] available to you the assets as per the whatever value is ultimately

assessed at the time of Mr. Hughes' death, but you will also have available to you the profits the company makes during these payout years to assist in making these tax payments; is that not correct?

A That is correct. And I don't want to be argumentative, but we will also have to bear the burden of losses that will be incurred by these companies since Mr. Hughes' death which might well be incurred in the future.

Q Right. Do you know of any method by which the heirs can reduce the tax burden upon the estate by effecting a transfer to a charitable institution? And I ask you that because I note that in the heir share agreement which either is or will shortly be introduced into the record today, I believe your mother has the power to effect a charitable transfer; is that not correct?

A Well, that's right. But I'm not going to express an opinion as to the effect the exercise of that power of appointment might have on the ultimate tax liability of this state.

Q All right, sir. Mr. Lummis, I would like to show you a document that's—I've just introduced as Exhibit T-5.

MR. HARRISON: May I approach the witness, your Honor?

THE COURT: Yes.

Q (By Mr. Harrison) And ask if you can identify that, sir?

[30] A This is a statement of claim and interpleader of Annette Gano Lummis and William R. Lummis, as Texas Administrators of the Hughes estate filed in the court of chancery of the State of Delaware, Newcastle County, Delaware in the interpleader action I previously referred to filed by Summa Corporation.

Q All right, sir. And with reference to this claim and interpleader filed by you and your mother in your capacity as Texas co-administrators, did you make any statement therein with regard to your contentions as to where Mr. Hughes' domicile of origin was?

A The—Neither of the Texas administrators made no assertion in this filing as to Mr. Hughes' domicile.

Q His domicile of origin, Mr. Lummis?

A Domicile of origin?

Q Yes, sir.

A No, unless I missed it.

Q Let me call your attention to numbered paragraph two, Mr. Lummis.

A Excuse me. I overlooked that. Yes. In this pleading, we acknowledged Mr. Hughes' domicile of origin was the State of Texas. He was born in Houston.

Q All right. And is it not correct that you testified in the Texas trial on domicile, the date of your testimony being on or about January the 4th of 1978, if you believe [31] me on the date, you did testify in the proceeding?

A Yes.

Q And in the course of your testimony, did you not testify that it was your opinion as an attorney and as an administrator that Mr. Hughes' domicile of origin was in Texas?

A No doubt about it.

Q All right, sir. He was born in Texas to parents domiciled in Texas?

A That's correct.

Q And one final question, Mr. Lummis, regarding this Delaware interpleader suit, the suit was initially brought by Summa Corporation against Mr. Bullock, Mr. Cory, all persons that Summa at the time knew might have some claim in the estate, seeking a for[u]m where domicile could be determined; is that not correct?

A That is correct.

Q And actually, it was brought in early May of 1976, within approximately a month after Mr. Hughes had died?

A Yes.

Q And is it not also correct that that suit was amended? The complaint by Summa was amended at a later time in September of 1977 and it dropped Mr. Cory and Mr. Alvord as defendants?

A I believe that's correct.

[32] Q All right, sir. So, if California is not a party to that case or has made no appearance in that case, it could in

part be due to the fact that plaintiff Summa Corporation has dropped California from the pleadings entirely?

A It's my recollection that they were dropped from the suit because they had made no appearance.

Q All right, sir.

MR. HARRISON: Pass the witness.

RECROSS EXAMINATION

QUESTIONS BY MR. MAYER:

MR. MAYER: Your Honor, as to the heir agreement we will shortly be introducing and offering a signed stipulation to the effect that the document may be introduced in evidence and for that reason, I have no further questions about that.

Q (By Mr. Mayer) Mr. Lummis, you testified on your direct, as I recall, that there are some intangible assets of the Hughes estate located in the State of Texas?

A Yes.

Q What are those assets?

A The principal assets are the stock, capital stock of Hughes Properties, Incorporated and 22 percent of the capital stock of Hughes Airwest. There are some other minor intangibles.

Q When you say those assets are located in the State of Texas, [33] do you mean merely that the stock certificates are in this State?

A Yes.

Q And where are they?

A They're in the custody of the Texas Commerce Bank under an agreement with the Texas Probate Court.

Q Is that in Houston?

A Yes, it is.

Q When you filed the Summa action in May 1976, I believe you just testified that you sought to name as defendants all persons who might have a claim against the Hughes estate?

A I did not file the Summa action. Summa filed it.

Q Well, is that what it basically sought to do?

A Well, yes. It sought to join those persons known at that time to have an interest in the estate. The thrust of the action, of course, was to get a court determination as to the stockholders of Summa Corporation pending a determination of the domicile of Mr. Hughes.

Q And one of the persons named as a defendant in that lawsuit was Defendant Cory, who is also a defendant in this one?

A I believe that's correct.

Q So, as of May 1976, the estate was aware, was it not, that Defendant Cory or the State of California might have a [34] claim against the Hughes estate?

A Yes.

MR. MAYER: Nothing further.

REDIRECT EXAMINATION

QUESTIONS BY MR. LILIENSTERN:

Q Mr. Lummis, you said that there are certain stock certificates in the hands of Texas Commerce Bank in Houston under an agreement with the court. What's the nature of that agreement?

A At the time of the appointment of my mother and me as temporary co-administrators of the Hughes estate, the Court set a bond for the administrators and also instructed as a part of that that an agreement be entered into between the Texas Commerce Bank and the Court, under which the physical custody of the Hughes estate assets located in Texas would be delivered to the Texas Commerce Bank and would be thereafter disbursed by the Texas Commerce Bank only upon order of the Texas Probate Court.

Q Is that referred to as a safekeeping agreement?

A Yes. That's what it is.

Q Do you have similar agreements in effect in other states in which estate property is located?

A Not formal agreements.

Q All right. Have you posted bonds in other states, you as administrator in other states in which you are an [35] administrator?

A Yes, I have.

Q Bonds in amounts set by the Probate Courts under whose jurisdiction you serve?

A Yes, in Delaware, Texas, and Nevada.

Q To your knowledge, was the judgment entered in Probate Court Number Two of the domicile of Mr. Hughes appealed by the Texas administrators?

A It was.

Q And is that appeal still pending?

A It is still pending, yes.

Q With respect to the nature of the assets of—I'm not sure if Mr. Harrison asked you about Summa Corporation or the estate; would you describe for the Court something about the nature of those assets of Summa Corporation?

A Summa Corporation has an interesting mix of assets. It has large amounts of unimproved real estate situated in California, Nevada and Arizona. Unimproved real estate, that is, investment realy [sic] estate, yields no income and bears a substantial carring [sic] cost. The company is also involved in various lines of operating business, including the hotel and casino business which is a substantial operation in Nevada and it's involved in the manufacture of helicopters at Culver City in California. It owns 78 percent of the stock of Hughes Airwest. It operates [36] a fixed base operation for general aviation in Las Vegas, Nevada. Those are the principal lines of business of the company.

Q Would you describe the assets of Summa, or well, of the estate as liquid or illiquid?

A Illiquid.

Q Illiquid?

A Yes.

Q What was the amount of federal estate taxes due and owing as reported by the estate on the federal estate tax return? I'm not sure I asked you that earlier. Do you have that figure?

A Yes. The—Let me refer to it to be specific about it. The net federal estate tax reported by the administrators as being due with respect to the Hughes estate and after taking

full 16 percent credit for state death taxes which might be incurred was $30,488,978.00.

Q Okay. Mr. Harrison was suggesting somewhat optimistically that the estate is ever increasing in value and that Summa is making profits and that given the payout which is permitted to pay all of the taxes due and owing, at least he was suggesting to me that there be sufficient assets to pay the, I believe you gave us the figure of $763,000,000.00. Do you have an opinion whether given the payout, the maximum payment permitted, the estate is going [37] to be able to pay an amount approaching that figure?

A In my opinion there would be no way for the Hughes estate to pay death taxes totaling $763,000,000.00.

Q Thank you, Mr. Lummis.

FURTHER RECROSS EXAMINATION

QUESTIONS BY MR. MAYER:

Q Just one additional question, Mr. Lummis.

THE COURT: Just one?

MR. MAYER: Just one.

THE COURT: All right.

Q (By Mr. Mayer) Do you have any power of attorney from your mother, Annette Gano Lummis?

A No, I do not.

FURTHER RECROSS EXAMINATION

QUESTIONS BY MR. HARRISON:

MR. HARRISON: Just one, your Honor.

Q (By Mr. Harrison) Mr. Lummis, with regard to the appeal of the Texas action wherein a verdict was rendered that Mr. Hughes' domicile of death was in Texas. Are you, through your capacity as Texas co-administrator an appellant in that action?

A Yes, sir.

Q All right. And you had testified that the appeal was pending. Is it not correct, Mr. Lummis, that after you sought and secured a temporary restraining order from this [38] Court last summer restraining the State of Texas from going

forward in its own courts, that you, through your attorneys, then went to the Court of Civil Appeals in Houston and secured and received a stay of that appeal pending the existence of Judge Roberts' temporary restraining order?

A I think that's the effect of the order entered by the Court of Civil Appeals.

Q Yes, sir. And so the fact that it's just pending and on stay is through machination that you have undertaken as a Texas administrator and as an appellant therein and as a plaintiff herein?

A That is correct.

MR. MAYER: Thank you. Your Honor, my purpose in speaking now is to address California's motion—

MR. LILIENSTERN: Excuse me. May Mr. Lummis be excused from the stand?

THE COURT: Yes. Stand aside, Mr. Lummis.

Filed July 10, 1979

In the United States District Court
for the Western District of Texas
Austin Division

[Title Omitted in Printing]

AFFIDAVIT OF BERT W. PLUYMEN IN SUPPORT OF MOTION FOR DISMISSAL

I, Bert W. Pluymen, being first duly sworn, depose and say:

1. I am a member of the State Bar of Texas and the Bar of this Court, and until September 1, 1978, was one of the attorneys for Defendants White and Bullock in the above entitled action. If called upon to do so, I could and would competently testify of my own personal knowledge to the facts set forth herein, except as otherwise indicated.

2. That during the period of July of 1976 until September 1, 1978, I was an Assistant Attorney General of Texas and was assigned to the representation of the State of Texas regarding the Estate of Howard R. Hughes, Jr.

3. On February 15, 1978, a jury in Probate Court No. 2 of Harris County, Texas, found that Howard R. Hughes, Jr., was domiciled in Texas at the time of his death on April 5, 1976. This verdict followed a trial of ten weeks which had commenced November 14, 1977.

4. Approximately twenty-five thousand documents were marked by the parties for possible introduction into evidence and 1,619 exhibits were actually introduced at the trial. Fifty-seven witnesses actually testified at the trial, plus sixteen testified by deposition.

5. Fifty-four oral depositions were taken preceding the trial. Assistant Attorneys General of Texas traveled to the states of New York, California, Utah, Nevada, Arizona, Maryland, Virginia, the District of Columbia, and the countries of Mexico and Canada taking depositions, interviewing witnesses and securing documents, all in preparation for the trial.

6. Over fifty thousand pages of documents were produced to the State of Texas in response to its motions to produce documents. These were indexed, summarized and organized for trial use.

7. The domicile case above referred to was on January 17, 1977, set for trial on September 12, 1977. On the motion of the estate, the trial date was on August 24, 1977, continued to November 14, 1977, and the trial did begin on that date.

DATED July 9, 1979.

/s/ Bert W. Pluymen

[Jurat Omitted in Printing]

Filed February 28, 1980

In the United States Court of Appeals
for the Fifth Circuit

[Title Omitted in Printing]

REQUEST FOR JUDICIAL NOTICE

Pursuant to Rule 201(d) of the Federal Rules of Evidence, Defendants Kenneth Cory, Controller of the State of California, and H. B. Alvord, County Treasurer of the County of Los Angeles (collectively referred to as "California"), hereby request the Court to take judicial notice of the documents submitted herewith as exhibits to this request. Exhibits A-1, A-2 and A-3 are three affidavits from the Reference Librarian of the Greeley Public Library in Greeley, Colorado, authenticating true and correct copies of certain pages from the 1977, 1978, and 1979 telephone directories for Greeley. Each of these pages contains the name of John Houstoun and shows an address in Windsor, Colorado. Attached hereto as Exhibit B is a duly certified certificate of registration signed by the Deputy County Clerk of Weld County, Colorado, which states that John McIntosh Houstoun resides and is registered to vote at 8962 Weld County Road 74, Windsor, Colorado. This address is the same as that listed in the 1978 and 1979 Greeley telephone directories. (The address in the 1977 directory is on the same road, but the number is different.) The certificate also states that Mr. Houstoun has been registered to vote in Windsor since October 1, 1976. Exhibit C attached hereto is a certified copy of Mr. Houstoun's registration affidavit, which shows that he has lived in Windsor since that date.

These materials are being submitted to this Court in order to establish conclusively a fact which no one contested below: that John McIntosh Houstoun, one of the twenty-two potential heirs of Howard Hughes whom California seeks to join in this action, resided in Windsor, Colorado on the date the complaint in this action was filed, July 14, 1978. Texas, having failed in the District Court to contest the adequacy of the showing made by California to support their claim that Mr. Houstoun then resided in Colorado, now contends in this Court that California's evidence on this point was insufficient to permit this action to be transferred to the District of Colorado. Texas Cross App. Br. at 28-30. We show in our Reply Brief filed concurrently herewith that this claim is meritless, but to erase any doubt on this score, this request has been made.

Under Rule 201(d) of the Federal Rules of Evidence, judicial notice is mandatory once a party formally requests it and provides the court sufficient information to enable it to determine that the materials submitted with the request are properly noticeable. Because duly certified official records and telephone directories are properly subject to judicial notice *(Massachusetts v. Westcott,* 431 U.S. 322 (1977) (public records); *McIntyre v. Michelin Tire Corp.,* 464 F. Supp. 1005 (D.S.C. 1978) (telephone directories)), notice of these materials is mandatory under Rule 201(d).[1]

This rule is as applicable to appellate courts as it is to trial courts. Rule 201(f), entitled "Time of Taking Notice," provides that "judicial notice may be taken at *any* stage of the proceeding." (Emphasis added). The Advisory Committee's note to this sub-

1. As to the propriety of taking judicial notice of telephone directories, *see also Sunrise Toyota, Ltd. v. Toyota Motor Co.,* 55 F.R.D. 519, 524-26 n.3 (S.D.N.Y. 1972) and *Harris v. Beech Aircraft Corp.,* 248 F. Supp. 599, 601 (E.D. Tenn. 1965).

section states, "[j]udicial notice may be taken at any stage of the proceedings, *whether in the trial court or on appeal.*" (Emphasis added). Rule 201(d), which states when judicial notice is mandatory, contains no words of limitation restricting its scope to the trial courts. Thus, Rules 201(d) and 201(f) lead inescapably to the conclusion that judicial notice is mandatory on appeal once properly requested. And this Court has recently held that judicial notice may be taken on appeal even though notice was not taken by the trial court. *Government of Canal Zone v. Burjan,* 596 F.2d 690, 694 (5th Cir. 1979).

In any event, in the circumstances of this case there can be no doubt as to the propriety of taking judicial notice. As noted, although Texas failed to contend in the District Court that the proof submitted by California as to Mr. Houstoun's Colorado residence was insufficient, it now seeks to raise this point in this Court. Had Texas timely raised this argument in the District Court, any deficiencies in the showing made by California could easily have been corrected. Now, having belatedly raised the point on appeal, Texas cannot complain if this Court takes judicial notice of materials directly responsive to its contention. To hold otherwise would permit Texas to profit from its failure to timely raise the argument it now advances.

Under Rule 201(b)(2) of the Federal Rules of Evidence, judicial notice may be taken of adjudicative facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned." The documents submitted with this request are indeed "sources whose accuracy cannot reasonably be questioned" and thus fall within the parameters of the rule. The telephone directories show that Mr. Houstoun lived in Windsor, Colorado during 1977, 1978 and

1979 and the registration records show that he has been registered to vote there since October 1, 1976. Together, these documents make possible the "accurate and ready determination" of Mr. Houstoun's address on July 14, 1978; they therefore may be judicially noticed.

DATED: February 25, 1980.

Of Counsel:
MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney

JEROME B. FALK, JR.
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
By: JEROME B. FALK, JR.
Attorneys for Defendants, Appellees and Cross-Appellants Kenneth Cory and H. B. Alvord

[Exhibits and Certificate of Service Omitted in Printing]

Filed December 19, 1980

In the United States Court of Appeals
for the Fifth Circuit

(Title Omitted in Printing)

MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

Pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, Defendants, Appellees and Cross-Appellants Kenneth Cory and H. B. Alvord move for a stay of this Court's mandate, pending the filing by them of a timely petition for writ of certiorari in the United States Supreme Court and the Supreme Court's disposition thereof. The ground for this application is more fully set forth in the Affidavit of Steven L. Mayer in Support of Motion for Stay of Mandate submitted herewith.

Dated: December 18, 1980.

Respectfully,

JEROME B. FALK, JR.
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation

By: STEVEN L. MAYER

Attorneys for Defendants, Appellees and Cross-Appellants Kenneth Cory and H. B. Alvord

Of Counsel:
MYRON SIEDORF
Chief Inheritance Tax Attorney
JAMES R. BIRNBERG
Assistant Inheritance Tax Attorney
Division of Inheritance & Gift Tax

[Certificate of Service Omitted in Printing]

U.S. Court of Appeals
Filed Dec. 31, 1980

Gilbert F. Ganucheau, Clerk

In the United States Court of Appeals
For the Fifth Circuit

No. 79-2898

WILLIAM RICE LUMMIS,
Texas Temporary Administrator of the
Estate of Howard R. Hughes, Jr., Deceased,
Plaintiff-Appellant, Cross Appellee,

versus

MARK WHITE, BOB BULLOCK, KENNETH CORY,
H. B. ALVORD, ET AL.,
Defendants-Appellees,

KENNETH CORY, H. B. ALVORD,
Defendants-Appellees
Cross Appellants.

Appeals from the United States District Court for the
Western District of Texas

ORDER:

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of defendants-appellees/cross-appellants for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 12, 1981, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the

Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ..... for a further stay of the issuance of the mandate is DENIED.

ROBERT A. VANCE
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
APR 15 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1556

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

CONTROLLER OF THE STATE OF CALIFORNIA
AND
COUNTY TREASURER OF THE COUNTY OF
LOS ANGELES

Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.,*

Respondents.

* * *

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

* * *

RESPONDENTS WHITE'S AND BULLOCK'S BRIEF IN OPPOSITION

* * *

RICK HARRISION *
PATTON G. LOCHRIDGE
McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
(512) 476-6982

DAVID DEADERICK *
GIBBINS, BURROW, WASH & BRATTON
Post Office Box 1452
Austin, Texas 78767
(512) 474-2441
* *Counsel of Record*

MARK WHITE
Attorney General of Texas

GILBERT J. BERNAL, JR.
Assistant Attorney General
Chief, Taxation Division
Post Office Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-4721

Attorneys for Respondents White and Bullock

QUESTION PRESENTED

Whether a federal district court has jurisdiction under the Federal Interpleader Act over an action brought by an administrator of an estate against the taxing officials of the State of Texas, the State of California and the County of Los Angeles, all of whom seek to impose domicile-based death taxes on the estate?

TABLE OF CONTENTS

Page

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. The Jurisdictional Holding Below, Based Upon Unique, Now Repealed, Provisions Of California Tax Law, Involves No Issue Of Recurring Importance 5

II. With Respect To The Points Raised In The Petition, The Opinion Below Does Not Conflict With That Of This Court Or Another Circuit Court Of Appeals 10

A. This Case Does Not Fall Within This Court's Exclusive Jurisdiction 11

B. Venue Is Properly Laid In Austin, Texas 14

C. The Citizenship Of An Interested Stakeholder Can Be Utilized To Establish Diversity Under 28 U.S.C. §1335 21

D. Petitioners Do Not Seek Review Of The Holding Below That The Eleventh Amendment Does Not Bar This Action 23

CONCLUSION 24

PROOF OF SERVICE 25

TABLE OF AUTHORITIES

Case	Page
Allegaert v. Chemical Bank, 432 F. Supp. 685 (E.D.N.Y 1977)	16
Ames v. Kansas, 111 U.S. 449 (1884)	13
Arizona v. New Mexico, 425 U.S. 794 (1976)	14
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1939)	7
Boeing Airplance Co. v. Perry, 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964)	16
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F. Supp. 485 (D. Md. 1962)	21
California v. Texas, order no. A-433, 434 U.S 993 (1977)	3
California v. Texas, 437 U.S. 601 (1978)	2,3,12,23
Case v. Bowles, 327 U.S. 92 (1946)	13
Chicago, R.I. & P. Ry. v. Igoe, 212 F.2d 378 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955)	19
Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823)	16
Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961)	7
Connally v. Georgia, 429 U.S. 245 (1977)	18
Dugan v. Ohio, 277 U.S. 61 (1928)	18
Edelman v. Jordan, 415 U.S. 651 (1974)	23
Ex parte Young, 209 U.S. 123 (1908)	7
Flast v. Cohen, 392 U.S. 83 (1968)	9
Flintkote Co. v. Allis-Chalmers Corp., 73 F.R.D. 463 (S.D.N.Y. 1977)	20

Case	Page
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	20,22
Harry Rich Corp. v. Curtiss-Wright Corp., 308 F. Supp. 1114 (S.D.N.Y. 1969)	16
Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980)	6
Hoffman v. Blaski, 363 U.S. 335 (1960)	15,16
Leroy v. Great Western United Corp., 443 U.S. 173 (1979)	22
Lummis v. White, 491 F. Supp. 5 (W.D. Tex. 1979)	4
Lummis v. White, 629 F.2d 397 (5th Cir. 1980)	4,5,21,23
McLeod v. Dilworth, 322 U.S. 327 (1944)	9
Matter of Trowbridge, 266 N.Y. 283, 194 N.E. 756 (1935)	14
Massachusetts v. Missouri, 308 U.S. 1 (1939)	14
Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931)	16
Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942)	13
Mollan v. Torrance, 9 Wheat. 537 (1824)	6
Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980)	17
Olberding v. Illinois Central R.R., 346 U.S. 338 (1953)	17
Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D.La. 1960)	21
Patterson v. Louisville & Nashville R.R., 182 F. Supp. 95 (S.D. Ind. 1960)	19
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	9,10
Smith v. Sperling, 354 U.S. 91 (1957)	6
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	21
Tumey v. Ohio, 273 U.S. 510 (1927)	18

Case	Page
United States v. California, 297 U.S. 175 (1936)	13
United States v. Louisiana, 123 U.S. 32 (1887)	13
United States v. Sorcey, 151 F.2d 899 (7th Cir.), *cert. denied*, 327 U.S. 794 (1945)	19
Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 389 F. Supp. 568 (E.D.Va. 1975)	18
Wigand v. Flo-Tek, Inc., 609 F.2d 1028 (2d Cir. 1980)	6
Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888)	17
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)	12,23

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. art. III, §2	13
U.S. Const. amend. X	10
U.S. Const. amend. XI	3,7,10,11,23,
26 U.S.C. §2001	8
26 U.S.C. §2011	8
28 U.S.C. §1251(a)(1)	4,11,12,13,15
28 U.S.C. §1254(1)	2
28 U.S.C. §1335	*passim*
28 U.S.C. §1341	10
28 U.S.C. §1397	14,15,22
28 U.S.C. §1404(a)	15,19,21,22
Judicial Code §233	13

Page

Calif. Prob. Code §571 16

Calif. Rev. & Tax. Code §14104 5

Calif. Rev. & Tax. Code §14795 5

Tex. Prob. Code §37 16

Tex. Prob. Code §233 16

Tex. Tax. - Gen. Ann. title 122A, art. 14.17 (Supp. 1981) 11

Rule 17(a), Fed. R. Civ. P. 16

OTHER AUTHORITIES

7 C. Wright & A. Miller, *Federal Practice & Procedure*, §1710 (1972) 21,23

13 C. Wright & A. Miller, *Federal Practice & Procedure*, §3601 (1972) 17

NO. 80-1556

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

CONTROLLER OF THE STATE OF CALIFORNIA
AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES

Petitioners,

VS.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,[1]

Respondents.

* * *

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

* * *

RESPONDENTS WHITE'S AND BULLOCK'S BRIEF IN OPPOSITION

* * *

---

[1]In the lower courts, this case was properly styled *Lummis v. White.* Since the issues presented here involve Petitioners' objections to the jurisdiction of the action filed by plaintiff Lummis, the appropriate style of this proceeding should be *Cory v. Lummis.* That style would have appeared on this brief but for the possible confusion it might have caused the Court. Petitioners' reasons for manipulating the style in this fashion are discussed, *infra,* at pp. 4-5 and 12-13 n.6.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Mark White, the Attorney General of Texas, on behalf of himself and Bob Bullock, the Comptroller of Public Accounts of Texas, and respectfully requests that the Court deny the petition for writ of certiorari.

JURISDICTION

Petitioners' assertion is correct that the Court under 28 U.S.C. §1254(1) has jurisdiction over the judgment entered by the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The seeds of this lawsuit sprouted from the grave of an abortive original action filed by the State of California on November 11, 1977. *California v. Texas*, 437 U.S. 601 (1978). That original action, in turn, had evolved from lengthy probate court litigation in Houston over the domicile of Howard Hughes. Following sixteen months of intensive discovery and trial preparation in the Texas case -- during which time Petitioners gave no indication that they intended to press any domicile claim with respect to Hughes -- California emerged on the eve of the Houston trial and attempted to barter access to this Court's original jurisdiction in return for a chance to collect most of its death taxes regardless of the merits of a California domicile claim.[2]

---

[2]As the Court may recall, the primary agreement between California and the Hughes estate was contingent upon this Court's exercise of original jurisdiction over California's suit against Texas. It provided that California would receive 2% of the federal net taxable estate if this Court accepted jurisdiction and determined that Hughes was a domiciliary of Texas at his death. California was to

(footnote continued on following page)

This Court properly refused to enjoin the Texas domicile trial. *California v. Texas*, order no. A-433, 434 U.S. 993 (Dec. 12, 1977). That trial lasted eleven weeks and resulted in a jury verdict, and, subsequently, a final judgment, that Hughes died domiciled in Texas. Respondent Lummis and one potential legatee appealed from that judgment.

California's motion for leave to file an original action was unanimously denied on June 22, 1978. *California v. Texas*, 437 U.S. 601 (1978). In response to the concurring opinions accompanying that decision, the Hughes estate filed this interpleader action in the United States District Court for the Western District of Texas, Austin division, on July 14, 1978. The District Court promptly restrained all parties from proceeding with Hughes domicile litigation in any other forum. On August 3, 1978, the Texas taxing officials, respondents White and Bullock, filed a motion to dismiss, asserting primarily that the action was barred by the Eleventh Amendment and the doctrine of collateral estoppel.

In the fall of 1978, Petitioners, who had obtained an extension of time to respond to the original complaint, persuaded the District Court that issues of joinder and venue should be resolved prior to a determination of subject matter jurisdiction. Petitioners then filed two companion motions. The first they accurately describe as a

---

footnote continued from previous page)

receive 18% of the federal net taxable estate if this Court determined that Hughes was domiciled *anywhere* other than Texas. A supplemental letter agreement also obligated the Hughes estate to furnish California with copies of pleadings, depositions and documentary evidence relevant to domicile, along with providing its attorneys for consultation to aid California in its suit against Texas. The texts of these agreements were set forth as appendices "E" and "F" to Texas' brief in opposition filed in *California v. Texas, supra.*

motion to join some twenty-two alleged heirs as defendants. (Pet. for Cert. 4). The second is incorrectly portrayed as a lofty, magnanimous motion brought solely to transfer the action to a "neutral forum," the District of Colorado. (*Id.*). Petitioners have neglected to inform this Court that they alternatively sought in that motion to transfer the case to Los Angeles. In November of 1978, the District Court denied Petitioners' motions to add parties and change venue.

Unable to effect a transfer of the case, Petitioners filed a motion to dismiss in February of 1979, based upon grounds similar to those asserted earlier by respondents White and Bullock. The District Court granted the motions to dismiss. *Lummis v. White*, 491 F. Supp. 5 (W.D.Tex. 1979). Respondent Lummis appealed, and Petitioners cross-appealed, seeking a transfer of the case to a federal district court in Colorado. The Court of Appeals reversed the finding of no jurisdiction but affirmed the denial of Petitioners' motions to add parties and change venue. *Lummis v. White*, 629 F.2d 397 (5th Cir. 1980).

Having again failed in their attempt to transfer the case to another district court, Petitioners filed with this Court both a second motion for leave to file an original action against Texas and a petition for certiorari. Now preferring to proceed in an original action, Petitioners have made certain changes to help achieve that goal. First, they alter their earlier position and argue for the first time that *no* district court has jurisdiction over this action because 28 U.S.C. §1251(a)(1) vests original jurisdiction exclusively with this Court. (Pet. for Cert. 7-9). Second, California has revised its inheritance tax laws in a manner which Petitioners now assert undercuts the jurisdictional basis of an interpleader action in district court. (Pet. for Cert. 18-23). And, finally, Petitioners manipulate the style of the case – which had been "*Lummis v. White*" in the

lower courts, and here should logically be "*Cory v. Lummis*" -- to emphasize their position that this is a suit between states.

REASONS FOR DENYING THE WRIT

I.

THE JURISDICTIONAL HOLDING BELOW, BASED UPON UNIQUE, NOW REPEALED, PROVISIONS OF CALIFORNIA TAX LAW, INVOLVES NO ISSUE OF RECURRING IMPORTANCE.

The Court of Appeals based jurisdiction under 28 U.S.C. §1335 upon the diverse citizenships of plaintiff Lummis and defendant Alvord, the County Treasurer of the County of Los Angeles. *Lummis v. White, supra,* 629 F.2d at 402-403. Recent changes in California inheritance tax law[3] eliminating county treasurers from the tax collection process virtually insure that the jurisdictional decision below will be limited to the facts of this case. That decision provides a sound, though not broad, jurisdictional basis for resolving this dispute, which is itself factually and procedurally unique. This

---

[3]Under California law in force at the time Hughes died and the time this interpleader action was filed, Alvord would collect any inheritance tax due from the Hughes estate and retain for the County a percentage of the amount so collected. *See* Calif. Rev. & Tax. Code §§14104, 14795 (1979). In the summer of 1980 -- after oral argument, but prior to a decision in the Fifth Circuit -- California passed a bill, which became effective on January 1, 1981, deleting the role of county treasurers in the tax collection process. (App. to Pet. for Cert. 38i). Petitioners made no effort to apprise the Court of Appeals about this revision prior to its decision and first did so on January 15, 1981 -- only after their petition for rehearing *en banc* had been denied -- in an out-of-time petition for rehearing that the Fifth Circuit refused to file.

Court should decline Petitioners' invitation to fashion a broad remedy for resolving hypothetical domicile-based death tax disputes which might occur in the future. (Pet. for Cert. 14-15). Precedent and logic counsel against utilizing this dispute as a springboard to reach lofty constitutional and statutory questions not raised by this case.

As a preliminary matter, it is necessary to dispose of Petitioners' argument that these recent changes in California inheritance tax law dissipate previously existing jurisdiction in this case. (Pet. for Cert. 18-19). It is clear that California's deleting of petitioner Alvord from its tax collection scheme, a unilateral action taken after oral argument on the appeal of this case, cannot defeat jurisdiction under section 1335. Few principles have been longer, or more firmly, established than that jurisdiction is determined when the original complaint is filed and that later occurrences are irrelevant. *Smith v. Sperling*, 354 U.S. 91 n. 1 (1957). Chief Justice Marshall unequivocally announced the governing rule in 1824:

> "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." *(Mollan v. Torrance*, 9 Wheat. 537 (1824)).

That rule is, of course, still followed today. *See, e.g., Hill v. Rolleri*, 615 F.2d 886, 889 (9th Cir. 1980); *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1032-33 (2d Cir. 1980). Were that not the law, diversity jurisdiction would be purely ephemeral because a defendent -- or, on appeal, any litigant dissatisfied with the result below --could always change his domicile to match that of an opposing party.

Similarly, California's voluntary action of revising its tax laws after suit was filed cannot defeat jurisdiction in this case. Otherwise, California could, theoretically at least, periodically pass the tax collection mantle from one official to another and insure that a court would never have jurisdiction of the proper party. That is plainly an unacceptable result and, just as plainly, is not the law.

Petitioners suggest that even if this now-repealed quirk in California inheritance tax procedure does establish jurisdiction in *this* case, the decision of the Court of Appeals does not provide a jurisdictional basis for other similar cases, and therefore this court should entertain an original action as precedent for resolving future domicile disputes. That view is wrong for at least two reasons. First, the jurisdictional decision below is quite narrow because the Fifth Circuit properly did not address a significant issue which would permit wide use of section 1335 for resolving domicile disputes. If, as respondent Lummis has argued below, the citizenship of state officials can be used to fulfill the diversity requirement of section 1335 because the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), not only strips state officials of their official character for purposes of the Eleventh Amendment but also renders them individual citizens for purposes of diversity analysis, statutory interpleader would provide a widespread remedy for domicile disputes of this nature. While respondents White and Bullock disagree with that argument, Petitioners' assertion that the decision below necessarily forecloses future use of section 1335 in similar cases is inaccurate. Since a resolution of that issue was unnecessary to the decision of this case, the Court of Appeals quite properly did not decide it. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1939) (Brandeis, J., concurring); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961).

Second, even if this Court were inclined to venture unnecessarily into uncharted waters to devise a remedy for hypothetical future disputes, it is sheer folly to suggest that an original action in this Court would be that remedy. For even Petitioners now concede that the possibility of an original action cannot exist unless the tax claims of the competing states, together with the federal estate tax, exceed 100% of the estate's assets, such that one state's claim will be at least partially uncollectible.[4] (Pet. for Cert. 14 n. 14). Effective shortly after Hughes' death, the maximum rate of the federal estate tax was reduced from 77% to 70%, with no corresponding reduction in the amount of the maximum available credit for state death taxes. *See* 26 U.S.C. §§2001, 2011 (1976). Thus, claims by only two states -- even where one has extremely high maximum death tax rates exceeding the federal credit, such as California's rate of 24%, rather than the customary "pick-up tax" which falls within the federal credit -- would not exceed that 100% jurisdictional limit even on the largest of estates. On a "small" estate of two million dollars, which would incur a maximum federal estate tax rate of 45%, it would take competing domicile claims from at least *eight* states whose maximum tax rate equals the federal credit of 7.2% in order to provide the necessary predicate for original jurisdiction in this Court. Quite obviously, such a remedy is not the panacea that Petitioners contend it to be.

---

[4]Respondents White and Bullock firmly believe that this type of dispute is not of the nature, magnitude or dignity to be considered a suit between states or to warrant exercise of this Court's original jurisdiction -- regardless whether the tax claims involved exceed 100% of the estate. *See* Part II(A), *infra*.

The Court of Appeals wisely refused to enter unnecessarily the quagmire of difficult and esoteric questions awaiting any attempt to provide a broad remedy for domicile disputes. The jurisdictional decision below provides an adequate basis for resolving *this* dispute in a federal district court. To criticize that decision because it "only" resolves this dispute is to fault the Court of Appeals for following the mandate of the Constitution and the decisions of this Court that restrict federal courts to deciding cases and controversies before them and forbid giving advisory opinions. *See, e.g., Flast v. Cohen,* 392 U.S. 83 (1968). Just as Justice Frankfurter once noted that "[a] boundary line is none the worse for being narrow," *McLeod v. Dilworth,* 322 U.S. 327, 329 (1944), the limited jurisdictional holding below properly fulfills its intended purpose: the resolution of the dispute between the litigants before the court.

The limited nature of the decision below gives this case "such an isolated significance" that this Court should not grant plenary review by writ of certiorari. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 76 (1955). If, and when, the truly bizarre confluence of events which gave rise to this dispute should recur, the Court will have not only an opportunity -- but, more importantly, perhaps a reason -- to address the issues in this petition. As Justice Frankfurter clearly indicated,

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes

> into play regard for the Court's duty to avoid decision of constitional issues unless avoidance becomes evasion. [citation omitted]" *Id.*, 346 U.S. at 74.

The issues raised by the petition are truly academic, for they are unnecessary to the decision of this case and the likelihood of a recurrence of these facts seems extremely remote. The writ of certiorari is not warranted under the circumstances. *Id.*

II.

WITH RESPECT TO THE POINTS RAISED IN THE PETITION, THE OPINION BELOW DOES NOT CONFLICT WITH THAT OF THIS COURT OR ANOTHER CIRCUIT COURT OF APPEALS.

Throughout the tortuous course of this litigation, the taxing officials of the State of Texas have believed and argued that *no* federal court has jurisdiction to relitigate the Texas state court determination that Howard Hughes was domiciled in Texas for purposes of the Texas inheritance tax. That position has been grounded primarily upon the Eleventh Amendment and the doctrine of collateral estoppel, and secondarily upon concepts of federalism embodied, *inter alia*, in the Tenth Amendment, the Tax Injunction Act (28 U.S.C. §1341), and the abstention doctrines.

Now, more than five years after Hughes' death and three years after the entry of the final judgment of Texas domicile by the Texas probate court, the Texas taxing officials are still prevented from proceeding with the appeal from the Texas domicile judgment and resolving disputes over valuation of the estate so that they may finally collect their tax bill from the Hughes estate. The statutory interest on that unpaid tax is

woefully insufficient to keep pace with the erosive effects inflation is working on whatever sum is finally collected.*See* Tex. Tax.-Gen. Ann. title 122A, art. 14.17 (Supp. 1981). Now facing the additional delay of at least one year if this Court grants a petition for certiorari, and recognizing the collection nightmares and possible relitigation which Petitioners will undoubtedly manufacture in state courts if no federal forum exists, the Texas officials must acknowledge that any attempt to vindicate before this Court their jurisdictional beliefs would, at best, result in the most pyrrhic of victories.

With Petitioners not content to litigate their tax claim in California state court and apparently intent on forcing relitigation of the Texas domicile judgment, the Texas taxing officials have concluded, as did the Fifth Circuit, that the most appropriate and efficient forum for that relitigation is the United States District Court for the Western District of Texas. For these reasons, the Texas officials filed no petition for certiorari to seek review of the Fifth Circuit's decision on the Eleventh Amendment and collateral estoppel issues. Nor do Petitioners seek review of the Eleventh Amendment ruling. Therefore, in all aspects now before the court, the opinion below provides a sound jurisdictional basis for resolving this particular case without conflicting with other decisions of this Court or forcing unnecessary resolution of delicate constitutional questions.

A. This Case Does Not Fall Within This Court's Exclusive Jurisdiction

Petitioners contend that the facts of this case constitute a controversy between the states of California and Texas. They then conclude that the matter comes within this Court's original and exclusive jurisdiction, with 28 U.S.C. §1251(a)(1) thus precluding federal district court interpleader jurisdiction under 28 U.S.C.

§1335.[5] Not only do Petitioners drastically misconceive the nature of this dispute and the identity of their true adversary, they misconstrue the import of section 1251(a)(1).

Despite Petitioners' protestations to the contrary, the State of Texas and the State of California are not on a collision course over the issue of Hughes' domicile for purposes of state death taxation. In fact, the two states are on parallel courses. Each is pursuing an independent tax claim against the Hughes estate, and "the Constitution permits *both* states to impose the tax." *California v. Texas, 437 U.S. 601, 612 (1978) (Stewart, J., concurring). See Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). As Justice Stewart so ably pointed out, while both states do have a similar dispute with the same adversary, no justiciable controversy exists between the two states themselves.[6] *California v. Texas, supra*, 437 U.S. at 611.

---

[5]This petition is the first time any party to this litigation has asserted that no federal district court can entertain this case because jurisdiction rests exclusively with this Court. In the lower courts, Petitioners, in an effort to induce a transfer to a federal district court in Colorado, argued that such a transfer would cure all jurisdictional defects. The District Court and Court of Appeals would be amazed and boggled to learn that Petitioners now assert that no district court, regardless of location, can exercise jurisdiction over this case. This jurisdictional legerdemain shows that Petitioners either think little of their argument under 28 U.S.C. §1251(a)(1) or have no regard for the time and effort expended by the lower courts in deciding Petitioners' tandem motions to add parties and change venue. Hopefully -- and justifiably – they think little of their section 1251(a)(1) argument.

[6]A more thorough discussion of the various reasons why no controversy between states exists will be presented in the brief in opposition to the State of California's motion for leave to file an original action against the State of Texas, which will subsequently be filed. Quite obviously, superficial ploys such as Petitioners' choice of the style of this proceeding – selecting a Texas official,

(footnote continued on following page)

More importantly, Petitioners' efforts to imbue this proceeding with arguments supporting an original action are misdirected. For even assuming, *arguendo*, that this situation could be conceptualized as a suit between states, federal district court jurisdiction under 28 U.S.C. §1335 would not be destroyed by section 1251(a)(1). For while Article III, section 2 of the Constitution extends the original jurisdiction of this Court to cases "in which a State shall be Party," it is well settled that Congress can grant concurrent original jurisdiction of such suits to the lower federal courts. *Ames v. Kansas,* 111 U.S. 449 (1884); *United States v. Louisiana,* 123 U.S. 32, 36 (1887).

Petitioners argue that section 1251(a)(1) is the final word from Congress fixing original jurisdiction of suits between states exclusively with this Court. Section 233 of the Judicial Code, the predecessor of section 1251(a), sparked similar arguments about its exclusive grant to this Court of original jurisdiction over cases "where a state is a party." It was consistently held that statutes otherwise vesting jurisdiction in federal district courts superseded the exclusivity provisions of section 233 in cases where a state happened to be a party. *United States v. California,* 297 U.S. 175 (1936); *Case v. Bowles,* 327 U.S. 92 (1946); *Minnesota v. United States,* 125 F.2d 636 (8th Cir. 1942). The Federal Interpleader Act similarly supersedes the very general exclusivity provision of section 1251(a)(1) and creates district court

---

(footnote continued from previous page)

rather than plaintiff Lummis, as the lead party and utilizing official titles rather than names – add nothing to the analysis or resolution of this issue.

jurisdiction over this action in the nature of interpleader.[7]

B. Venue Is Properly Laid In Austin, Texas.

Congress has prescribed special limitations on venue for interpleader actions brought pursuant to section 1335. Those limitations are set forth in 28 U.S.C. §1397, which provides that such actions "may be brought in the judicial district in which one or more of the claimants reside." All parties concede that the Texas taxing officials, respondents White and Bullock, reside in Austin, Texas and are claimants for inheritance taxes from the Hughes estate. Venue in Austin thus clearly satisfies the requirements of section 1397.

Petitioners, however, assert that the nature of this particular interpleader action makes venue in Austin inappropriate and urge that "the interest of justice" mandates transfer of the case to Denver, Colorado, a

---

[7]Petitioners' view that this court is the only tribunal empowered to hear suits between states cannot be squared with numerous decisions to the contrary. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794 (1976); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Matter of Trowbridge*, 266 N.Y. 283, 194 N.E. 756 (1935). Nor does it comport with the statement made by Petitioners' counsel at oral argument before the Fifth Circuit:

> MR. FALK: No, we don't want to play any procedural game. And I understand why the result in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act. (Tr. of March 31, 1980, 5th Cir. Arg. at p. 19)

"neutral forum."[8] The decisions of the lower courts denying Petitioners' motion to transfer are indisputably correct for two reasons.

First, the District of Colorado is not a forum to which this case may be transferred. Because no claimant resides in Colorado, that district is not one where the action "might have been brought" originally under section 1397, and therefore no transfer to Colorado is available. 28 U.S.C. §1404(a); *Hoffman v. Blaski*, 363 U.S. 335 (1960). Petitioners attempted to skirt this obvious impasse by filing, as a companion to their 1404(a) motion, a motion to add as defendants some twenty-two[9] self-proclaimed heirs of Hughes, one of whom was

---

[8]Petitioners also moved, alternatively, that the case be transferred to Los Angeles, California. Having been unable to persuade either the District Court or Court of Appeals to transfer this action, Petitioners now argue here -- for the first time -- that 28 U.S.C. §1251(a)(1) precludes *any* federal district court from exercising jurisdiction over this case. *See* Part II(A), *supra*. And, to buttress their position that an original action in this Court is the only appropriate remedy for this dispute, Petitioners further contend that because the strictures of section 1397 do not permit transfer of this case to Colorado, section 1335 is "the wrong remedy." (Pet. for Cert. 14). While it is indeed true that Colorado is not a potential transferee forum, statutory interpleader does remain a viable remedy in this case.

[9]The "lucky" 22 were those who were signatories to a settlement agreement purporting to divide the estate among themselves regardless of Hughes' domicile. Because Annette Gano Lummis --Hughes' now-deceased aunt who resided in Houston -- was the sole heir under the intestacy law of California and Nevada, and because no determination of heirship has been made by the Texas probate court, it is difficult to comprehend Petitioners' selection process. If the joinder of all *potential* heirs were required, more than 400 persons who have filed appearances in the Texas probate proceeding claiming heirship under Texas law would have to be added in this case.

allegedly a resident of Denver, Colorado.[10] But heirs --much less *potential* heirs -- are clearly not "claimants" in this interpleader action involving death tax claims because their rights in the estate do not attach until tax questions like those involved here are resolved, the administration of the estate is closed, and the remaining assets are distributed to them by the administrators.

Furthermore, the administrators of the estate, having the present possessory right in, and control of, the estate and the duty to preserve the estate and prosecute suits to protect estate assets, are the real parties in interest and only proper parties to this action. *See, e.g., Tex. Prob. Code* §§ 37, 233; Calif. Prob. Code § 571; Fed. R. Civ. P. 17(a). By determining that the alleged heirs should not be joined, the courts below followed long-standing precedent that executors and administrators are the proper parties and may bring suit in their own names without joining the estate's beneficiaries. *See Childress v. Emory*, 21 U.S. (8 Wheat.) 642, 669 (1823); *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931); *Boeing Airplane Co. v. Perry*, 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

---

[10]Petitioners failed to make sufficient factual showing below that a potential heir even resided in Colorado on July 14, 1978, the date this case was commenced. That date is, of course, the relevant one for determining whether the action "might have been brought" in Colorado originally, even if the potential heirs had been joined as parties. *Allegaert v. Chemical Bank*, 432 F.Supp. 685 (E.D.N.Y. 1977); *Harry Rich Corp. v. Curtiss-Wright Corp.*, 308 F.Supp. 1114 (S.D.N.Y. 1969); *see Hoffman v. Blaski* 363 U.S. 335 (1960). Petitioners merely introduced an affidavit of their counsel asserting that one alleged heir signed the settlement agreement in Colorado, in June of 1977, and in no way established either that the person in question was a resident of Colorado, or had resided there on July 14, 1978, or was even an heir of Hughes.

This Court recently held that the citizenship of the trustees, rather than the trust beneficiaries, is determinative for purposes of diversity jurisdiction because the trustees are the real parties in interest. *Navarro Savings Ass'n v. Lee*, 446 U.S. 458 (1980). The logic of *Navarro* confirms that the administrators of the estate, rather than the potential heirs, are the appropriate parties in this case. Since no claimant resided in Colorado when the case was commenced, the courts below properly denied Petitioners' motion to transfer because, "[t]he requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953).

Second, even if the potential heirs had been added as claimants and it had been proved that one such person did reside in Colorado on July 14, 1978,[11] Petitioners' motion to transfer was properly denied because the interest of justice does not mandate a transfer to Colorado. The argument that a transfer is necessary to reach a "neutral forum" ignores the very logic underlying the diversity jurisdiction of federal courts. Petitioners are not being compelled to submit to the jurisdiction of a Texas state court, but rather a federal district court, a "national tribunal," *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888), whose jurisdiction under section 1335 would be bottomed on diversity of citizenship. The very purpose underlying that jurisdictional grant was that a federal district court would provide a forum in which out-of-state litigants could escape local prejudice. 13 C. Wright & A. Miller, *Federal Practice & Procedure*, §3601 at p. 574 (1972).

---

[11] *See* note 10, *supra*.

Petitioners contend that even if the court were fair, Texas jurors would not be. This argument rests, at bottom, on the assumption that the dizzying sum of $12.34[12] that each juror might stand to gain in taxes by a verdict of Texas domicile would make the jury panel ignore their sacred jurors' oath and render a verdict based upon their pecuniary interest rather than the evidence before them.[13] Merely to state this reasoning shows why the cases relied on by Petitioners are inapposite. For in contrast to this case, the fact finder in *Tumey v. Ohio,* 273 U.S. 510 (1927), received approximately $100 per month from his pecuniary interest in convictions, while the justice of the peace in *Connally v. Georgia,* 429 U.S. 245 (1977), made more than $50,000 in three years by issuing warrants, and those fees were his salary. Here, there is no substantial, repeating and direct interest by Texas jurors as existed in *Tumey* and *Connally.* The one-time, indirect interest of $12.34 that a juror might have is clearly *de minimus* and does not mandate transfer of the case. *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,* 389 F.Supp. 568 (E.D. Va. 1975). *Cf. Dugan v. Ohio,* 277 U.S. 61 (1928) (distinguishing *Tumey*).

---

[12]This is the maximum figure, based on the California inheritance tax referee's $1.1 billion appraisal of the estate. Under the IRS appraisal of approximately $465 million, the sum, based on Petitioners' method of calculation, would be roughly $5.22, whereas using the Estate's own valuation of $168 million, the figure would be all of $1.89 – not even enough to buy a decent chicken fried steak.

[13]It is highly speculative that a layman will even know that a finding of Texas domicile would have any bearing on inheritance taxes collected by the State. Mention of that fact may be avoided by a proper motion in limine, as Texas used in the previous state trial to avoid any conceivable prejudice.

Petitioners' professed fears about publicity concerning the prior state court trial and verdict are similarly unfounded. Their arguments in this regard were weak and exaggerated when first made before the District Court in the fall of 1978, some eight months after the end of the Texas trial. Now, more than three years after that trial, any prejudice that could possibly have arisen from whatever publicity there was in Austin about the Houston trial has completely dissipated. By the time this case reaches trial, no residual effect of prior publicity could possibly exist.

The voir dire process will screen any potential juror who may actually be affected by the factors which worry Petitioners. And the District Court will instruct the jury to decide this case solely on the basis of the evidence presented to it. The system of voir dire and strict control of the jury by instructions from the bench is designed to handle problems such as Petitioners now fear exist, and there has been no showing that it will be incapable of handling potential juror bias in this case. In fact, the presumption is that the system will work. "[I]t is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court...", *United States v. Sorcey*, 151 F.2d 899, 903 (7th Cir.), *cert. denied*, 327 U.S. 794 (1945), and "we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists." *Chicago, R.I. & P. Ry. v. Igoe*, 212 F.2d 378, 382 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955). *Accord, Patterson v. Louisville & Nashville R.R.*, 182 F.Supp. 95 (S.D. Ind. 1960).

Finally, for several reasons, the interests of justice[14] strongly point to the Western District of Texas as an ap-

---

[14]The other factors under 28 U.S.C. §1404(a) -- the convenience of the parties and witnesses -- overwhelmingly favor Austin venue. In balancing these other factors based on the evidence presented, the

(footnote continued on following page)

propriate forum for this case. Trial of this case could well last several months, which will place an extraordinary burden on the jurors chosen to hear the case. As this Court has stated, "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977). It is not in the interests of justice to saddle the citizens of Denver with the time-consuming and expensive burden of this trial.

The Texas taxing officials have already expended a vast amount of time, and not an insubstantial amount of money and personal effort, litigating the issue of Hughes' domicile in state court. The Hughes estate, which selected Austin venue, has also incurred large litigation expenses from the Texas trial. Only Petitioners, who sat on the sidelines watching that initial fray, have their war chest intact for future litigation. These same Petitioners who waited until the eve of the Texas trial to assert any domicile claim with respect to Hughes now ask to be rewarded for their sloth with a transfer which will drastically increase litigation costs to all other parties. Since Petitioners are now forcing the Texas officials to relitigate the domicile issue, with the attendant waste of most of the expense of the prior Texas trial, the interest of justice should mandate that venue be laid in Austin, with the enormous savings of time and money that an Austin trial will mean to the Texas officials. And, of course, the concomitant savings in litigation expenses by the estate will benefit all parties, as it will increase the corpus of the estate upon which taxes may be assessed.

(footnote continued from previous page)

District Court found Austin superior to Los Angeles, and Petitioners have not appealed that ruling. Denver, having no connection with this litigation, offers absolutely nothing in the way of convenience for anyone.

Having evaluated the law and the evidence in light of the concerns set forth in section 1404(a), the District Court correctly determined that Austin, Texas is the most appropriate forum for this case. The Court of Appeals affirmed that ruling. The writ should not issue to review those decisions.

C. The Citizenship Of An Interested Stakeholder Can Be Utilized To Establish Diversity Under 28 U.S.C. §1335.

The Court of Appeals based jurisdiction under section 1335 upon the citizenship of plaintiff Lummis, an administrator of the Hughes estate found to be an interested stakeholder. *Lummis v. White, supra,* 629 F.2d at 403. That ruling comports with the overwhelming weight of the case law and commentary, which permit and urge the broadest possible application of interpleader. *See, e.g., Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477 n. 8 (E.D.La. 1960); 7 C. Wright and A. Miller, *Federal Practice & Procedure,* §1710 at pp. 405-407 (1972); *cf. State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967) (§1335 requires only "minimal diversity").

Unable to cite a single case to support their position, Petitioners instead offer two examples to demonstrate how consideration of an interested stakeholder's citizenship will have an untoward effect on established principles of diversity jurisdiction. (Pet. for Cert. 16-17). In the first example, Petitioners posit a simple bilateral dispute between an insurer from one state and a claimant from a second state and contend that the ruling below would provide jurisdiction for such an action under section 1335. Such a case obviously cannot be

brought under section 1335 because it is not an interpleader or in the nature of interpleader -- a threshold requirement under the statute -- for the simple reason that the stakeholder is faced with only a single claim to the stake in his possession. By contrast, in the case at bar, while the citizenships of only Lummis and Alvord were used to satisfy the diversity requirement of section 1335, the additional claims of the state taxing officials were viewed by the Court of Appeals as creating the requisite situation in the nature of interpleader.

Petitioners' other example is no more instructive than the first. It suggests that an interested stakeholder, as a "claimant" under sections 1335 and 1397 (venue), would be able to bring suit in the place of his own residence, thereby causing unthinkable forum abuse. The specific example is of a Delaware insurer who denies liability to, and then interpleads, a dozen California (or west coast) claimants and forces them to litigate their claims in Delaware, despite the fact that none of those claimants had any prior contacts with Delaware. (Pet. for Cert. 16-17). Clearly, such a situation would easily be remedied by filing a motion to transfer the case to California under 28 U.S.C. §1404(a) for the convenience of the witnesses and parties, and to promote the interest of justice. Courts will not permit plaintiffs "an unfettered choice" of districts and will not allow litigation to proceed in a forum with no relation to the case. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185 (1979); *Gulf Oil Co. v. Gilbert, supra*, 330 U.S. at 508-509. In fact, the obvious merit to such a 1404(a) motion underscores why Petitioners' own similar motion in this case was properly denied.

In sum, Petitioners' contention that the citizenship of an interested stakeholder cannot establish diversity under section 1335 is most clearly laid to rest by the analysis of Professor Wright:

> "Nevertheless, once an interested stakeholder deposits the fund with the court or posts an appropriate bond, he does become a claimant for all practical purposes and his citizenship should be relevant in deciding the jurisdiction question. Moreover, since, by hypothesis, the stakeholder's citizenship will be diverse from that of at least one of the claimants, the interpleader has interstate aspects and therefore seems to fall within the class of cases intended to be covered by the statute." (7 C. Wright & A. Miller, *supra*, at p. 407)

The decision of the Court of Appeals in this respect is correct, and the writ should not issue to review it.

D. Petitioners Do Not Seek Review Of The Holding Below That The Eleventh Amendment Does Not Bar This Action.

The Court of Appeals rejected the contention of Petitioners and of respondents White and Bullock that this action is barred by the Eleventh Amendment. *Lummis v. White, supra*, 629 F.2d at 402. The Court agreed with, and deferred to, the four concurring Justices in *California v. Texas*, 437 U.S. 601 (1978), who suggested that *Edelman v. Jordan*, 415 U.S. 651 (1974), had undercut the Eleventh Amendment holding of *Worcester County Trust Co. v. Riley, supra.*

Petitioners do not seek review of the Eleventh Amendment holding below, nor do respondents White and Bullock. It is therefore unnecessary to grant the writ to resolve the obvious conflict between this Court's opinion in *Worcester County Trust Co. v. Riley, supra*, and that of the Court of Appeals below.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

DATED: April 15, 1981

Respectfully submitted,

MARK WHITE
Attorney General of Texas

GILBERT J. BERNAL, JR.
Assistant Attorney General
Chief, Taxation Division
Post Office Box 12548
Austin, Texas 78711
(512) 475-4721

RICK HARRISON *
PATTON G. LOCHRIDGE
McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
(512) 476-6982

DAVID DEADERICK *
GIBBINS, BURROW, WASH & BRATTON
Post Office Box 1452
Austin, Texas 78767
(512) 474-2441

Attorneys for Respondents White and Bullock

* Counsel of Record

PROOF OF SERVICE

I, William David Deaderick, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Respondents White's and Bullock's Brief in Opposition have been served on each party separately represented in this proceeding by depositing the same in a United States post office, with first-class postage prepaid, certified, return receipt requested, on this 15th day of April, 1981, addressed as follows:

Jerome B. Falk, Jr.
Steven L. Mayer
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
650 California Street
Suite 2900
San Francisco, California 94108

Oscar C. Lilienstern
ANDREWS, KURTH, CAMPBELL & JONES
25th Floor, Exxon Building
Houston, Texas 77002

Solicitor General
Department of Justice
Washington, D.C. 20530

Charles D. Dye
BROWN, MARONEY, ROSE, BAKER & BARBER
1300 American Bank Tower
Austin, Texas 78701

Ronald E. Gother
GIBSON, DUNN & CRUTCHER
515 South Flower
Los Angeles, California 90071

William David Deaderick

Office-Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA
AND COUNTY TREASURER OF THE
COUNTY OF LOS ANGELES,
Petitioners,

v.

ATTORNEY GENERAL OF THE
STATE OF TEXAS, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

O. CLAYTON LILIENSTERN*
PATRICIA A. STEVENSON
ANDREWS, KURTH,
CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002
(713) 652-2412

Of Counsel:
PROFESSOR
JAMES WILLIAM MOORE
New Haven, Connecticut

R. JAMES GEORGE, JR.
JOHN M. HARMON
GRAVES, DOUGHERTY,
HEARON & MOODY
2300 Austin National Bank Tower
Austin, Texas 78701
Attorneys for Respondent,
William R. Lummis, Texas
Administrator of the Estate of
Howard R. Hughes, Jr., Deceased.

*Counsel of Record

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1. Whether certiorari should be denied because the case as structured by the Court of Appeals is unique and does not present the appropriate vehicle for the general resolution of interstate death tax controversies.

2. Whether the Court of Appeals correctly determined that jurisdiction exists in this action under the Federal Interpleader Statute on the basis of the diversity of citizenship between two adverse claimants, the Texas Administrator of the Hughes Estate (Lummis, a citizen of Nevada) and the County Treasurer of Los Angeles County (Alvord, a citizen of California).

3. Whether the jurisdiction determined to exist by the Court of Appeals is affected by the change in the California inheritance tax law which transfers the claim of the County Treasurer to the State Controller.

PARTIES

Petitioners are Kenneth Cory ("Cory"), Controller of the State of California, and H. B. Alvord ("Alvord"), County Treasurer for the County of Los Angeles, citizens of California. Respondents include William R. Lummis ("Lummis"), Texas Administrator of the Estate of Howard R. Hughes, Jr. ("Estate"), a citizen of Nevada, who is also Nevada Co-Special Administrator of the Estate, Louisiana Provisional Administrator of the Estate, and Delaware Ancillary Administrator of the Estate; Mark White, Attorney General of Texas and Bob Bullock, Comptroller of Public Accounts of Texas, citizens of Texas; Richard Gano, California General Administrator of the Estate, a citizen of California; First National Bank of Nevada, Nevada Co-Special Administrator of the Estate, a citizen of Nevada; and the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
PARTIES	II
TABLE OF AUTHORITIES	III
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR DENYING THE WRIT	5
THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY SUSTAINED JURISDICTION ON A BASIS UNIQUE TO THIS CASE WHICH IS UNAFFECTED BY THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW AND THIS BASIS WILL NOT HAVE GENERAL APPLICATION TO FUTURE CASES	5
1. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MINIMAL DIVERSITY REQUIREMENT OF THE FEDERAL INTERPLEADER STATUTE IS SATISFIED IN THIS CASE.	7
2. THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW DOES NOT AFFECT THE HOLDING OF THE COURT OF APPEALS THAT ALVORD IS A CITIZEN OF CALIFORNIA FOR DIVERSITY PURPOSES.	11
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

	Page
Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975)	11
Austin v. Texas-Ohio Gas Co., 218 F.2d 739 (5th Cir. 1955)	9
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F. Supp. 485 (D. Md. 1962)	10
California v. Texas, 437 U.S. 601 (1978)	8
District of Columbia v. Sweeney, 310 U.S. 631 (1940)	15
Fred Harvey, Inc. v. Mooney, 526 F.2d 608 (7th Cir. 1975)	13
Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970)	14
Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945)	11

CASES

	Page
Hardenbergh v. Ray, 151 U.S. 112 (1893)	13
Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957)	10
Holcomb v. Aetna Life Ins. Co., 228 F.2d 75 (10th Cir. 1955)	9
Huddleston v. Dwyer, 322 U.S. 232 (1944)	11, 12
Kennametal, Inc. v. International Union, 161 F. Supp. 362 (W. D. Pa. 1958)	13
Lummis v. White, 629 F.2d 397 (5th Cir. 1980)	4, 5, 7, 8, 9
Mollan v. Torrance, 9 Wheat (22 U.S.) 537 (1824) (Marshall, J.)	12
Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960)	9, 10
Rice v. Sioux City Memorial Cemetery, Inc., 349 U.S. 70 (1955)	15
Smith v. Allwright, 321 U.S. 649 (1944)	6
Smith v. Sperling, 354 U.S. 91 (1957)	12, 13
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	8, 10
Television Reception Corp. v. Dunbar, 426 F.2d 174 (6th Cir. 1970)	13
Texas v. Florida, 306 U.S. 398 (1939)	8
Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939)	10

CONSTITUTION

U. S. Const. Amend. XI	6, 7

STATUTES

28 U.S.C. § 1251(a)	3
28 U.S.C. § 1254(1)	5
28 U.S.C. § 1331	4
28 U.S.C. § 1332	8, 12
28 U.S.C. § 1335(a)	2, 7, 12
28 U.S.C. § 1343(3)	4
28 U.S.C. § 1397	2
28 U.S.C. § 1404(a)	2, 10
28 U.S.C. § 2361	2, 3
42 U.S.C. § 1983	4

OTHER AUTHORITIES

3A Moore's Federal Practice § 22.09[1] (1979)	10
7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1710 (1972)	10
13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3608 (1975)	12

No. 80-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF TEXAS, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr., Deceased, respectfully prays that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 27, 1980 be denied.

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1335(a), 28 U.S.C. § 1397, 28 U.S.C. § 1404(a), 28 U.S.C. § 2361, and sections 14104, 14791, 14793-95 of the California Revenue and Taxation Code, and Chapter 634 California Statutes, 1980.

28 U.S.C. § 1335(a) provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property. . . ."

28 U.S.C. § 1397 provides:

> "Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

28 U.S.C. § 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U.S.C. § 2361 provides:

> "In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United

States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

The California statutes referred to above are set forth in Appendix I of the Petition for Certiorari. 28 U.S.C. § 1251(a) which is set forth in the Petition for Certiorari at page 2 is not involved in this proceeding and is relevant only to the Motion For Leave To File Complaint, No. 88, Original, previously filed with this Court.

STATEMENT OF THE CASE

Respondent Lummis generally agrees with the Statement of the Case contained in pages 3-6 of the Petition for Certiorari ("Petition"). There are, however, two statements in the Petition that require clarification. There are no "principal defendants" in this action as suggested by Petitioners. (Pet. 3) Lummis interpleaded as defendants all those parties asserting competing claims against the Estate, and as the Amended Complaint shows there is no hierarchy among defendants; Alvord, as a claimant was properly joined in this action. The restraining order issued by the district court under 28 U.S.C. § 2361 was applicable to the defendant taxing officials, and not as Petitioners assert (Pet. 4), to the states of California and Texas.

Moreover, there are additional facts which should be noted. The Amended Complaint in this action contained additional bases of jurisdiction which were unnecessary to, and not addressed by, the Court of Appeals' holding that interpleader jurisdiction exists. Included are the diversity which exists between the state taxing officials of California and Texas, a right to travel claim under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), and a constitutional due process claim under 28 U.S.C. § 1331.

The Court of Appeals declined to consider the issue of whether the United States had been properly joined as an interpleader claimant under 28 U.S.C. § 2410(a) because this issue had not previously been decided by the district court. *Lummis v. White*, 629 F.2d 397, 404, n.14 (5th Cir. 1980). The Court of Appeals remanded the issue to the district court for decision. The issue has not reached the district court because the mandate of the Court of Appeals was stayed in connection with the filing of the Petition in this proceeding.

Petitioners sought an order in the District Court for the Western District of Texas to transfer this action to the District of Colorado or, alternatively, to the Central District of California, residence of the County Treasurer, Alvord. The transfer to either location was denied by the district court and the Court of Appeals found that the denial was not an abuse of discretion.

It is not disputed by Petitioners that unless the issue of the domicile at death of Mr. Hughes is decided in a unitary proceeding in which the tax officials of both California and Texas are parties and will be bound, the very real possibility exists that the state courts of each of these states will determine that Mr. Hughes died domiciled in their respective jurisdictions. Because of this, the

Estate is confronted with the prospect of multiple liability and the certainty of multiple vexatious litigation. Inconsistent determinations would permit each state to assess death taxes on the intangible assets of the Estate (which constitute over 99% of its value) despite the fact that under the law of each state a decedent may have only one domicile at death. The total applicable tax rate if both Texas and California were permitted to assess inheritance taxes against the Estate when combined with the federal estate tax, reduced by a state death tax credit, is approximately 101%. *Lummis v. White, supra,* at 398, n.4.

REASON FOR DENYING THE WRIT

THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY SUSTAINED JURISDICTION ON A BASIS UNIQUE TO THIS CASE WHICH IS UNAFFECTED BY THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW AND THIS BASIS WILL NOT HAVE GENERAL APPLICATION TO FUTURE CASES

The Petition for Certiorari filed in this cause by the California taxing officials, although ostensibly a request for the Court to exercise its discretion to review the decision below under 28 U.S.C. § 1254(1), is in reality an attempt to advance its companion Motion For Leave To File Complaint which the California taxing officials simultaneously filed in this Court. (No. 88, Original)[1]

1. This is further evidenced by the novel manner in which Petitioners have chosen to style their Petition for Certiorari attempting to suggest that this jurisdictional dispute is primarily between the taxing officials of California and the taxing officials of Texas. As the proceedings in the courts below plainly show, Lummis initiated this action, interpleading as claimants the taxing officials of Texas and California as well as the other administrators. Lummis prevailed in the Court of Appeals, and Petitioners are now seeking review of that court's judgment in favor of Lummis.

Petitioners here raise for the first time in this case their contention that this action can be heard only under this Court's original and exclusive jurisdiction as a dispute between two states.[2] However, as this case was initially formulated and developed, it was and remains a statutory interpleader suit.

This action, as it reaches this Court, does not present Questions 1, 2 and 5 as set forth in the Petition. Rather, it involves the narrow issue of whether the Court of Appeals properly found that the minimal diversity requirement of statutory interpleader can be satisfied by looking to the citizenship of an interested stakeholder (Lummis) and the citizenship of a county taxing official (Alvord). Petitioners themselves concede the narrowness of this proceeding, "[f]or the reasons already stated, however, the unique circumstances of this case which led the Court of Appeals to find jurisdiction will not be repeated; the decision below is thus an 'adjudication[ ] . . . in[ ] the same class as a restricted railroad ticket, good for this day and trip only.' " (Pet. 15, quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

The Court of Appeals did not decide the issue which was fully briefed in the courts below of whether the

---

2. In fact, at oral argument before the Fifth Circuit, Counsel for Petitioners, Mr. Falk, agreed in principle that federal interpleader is proper in this case:

> MR. FALK: No, we don't want to play any procedural game. And I understand why the result [dismissal of the interpleader suit by the district court] in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act.

(Transcript, Oral Arguments, March 31, 1980, at 19.)

citizenship of state officials, where the relief sought is prospective injunctive relief, may be considered for diversity purposes. The court, having found the requisite minimal diversity existing between Lummis and Alvord, looked no further in reaching the conclusion that the elements of statutory interpleader had been satisfied. The Court of Appeals also held that the Eleventh Amendment is no bar to the action brought by Lummis because only prospective equitable relief is sought. *Lummis v. White, supra* at 402. This holding is unchallenged by Petitioners.

Petitioners seek here an unnecessarily broad review of the problem of interstate death tax controversies. While such a review by this Court may be warranted in a petition appropriately presenting the problem, such issues are not presented in this case as structured by the decision of the court below. The decision of the Court of Appeals raises no "special and important reasons" for granting certiorari as required by Supreme Court Rule 17. It does not involve an important question of federal law which should be settled by this Court; it does not conflict with any decision of this Court; and it does not call for an exercise of this Court's "power of supervision." Because the Court of Appeals sustained jurisdiction on a basis unique to this case, this is not a situation which warrants the exercise of this Court's extraordinary and discretionary certiorari jurisdiction.

1. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MINIMAL DIVERSITY REQUIREMENT OF THE FEDERAL INTERPLEADER STATUTE IS SATISFIED IN THIS CASE.

The Federal Interpleader Statute, 28 U.S.C. § 1335, requires that there be two or more adverse claimants of

diverse citizenship who claim or may claim a right to the money or property in the custody or possession of the stakeholder. Only "minimal diversity" is required. *State Farm Fire & Cas. v. Tashire,* 386 U.S. 523 (1967). The requirement of "minimal diversity" is satisfied where two claimants are of diverse citizenship as defined in 28 U.S.C. § 1332. The Court of Appeals affirmed the district court's holding that Alvord was a citizen of California for diversity purposes and concluded that Alvord and the Texas Administrator, Lummis, a citizen of Nevada, were adverse, diverse claimants under the statute.

Petitioners incorrectly suggest that the Court of Appeals hinged its determination that Lummis was an interested stakeholder on the difference between the California inheritance tax rate of 24% and the Texas inheritance tax rate of 16%. (Pet. 11) In fact, the court's opinion plainly shows that it concluded that Lummis was an interested stakeholder, and therefore an interpleader claimant, because as administrator: (1) he has a legal duty to preserve the assets of the estate and to protect those assets against double death tax liability; (2) he asserts that Hughes died domiciled in Nevada; and (3) he stands to collect an administrator's fee. *Lummis v. White, supra,* at 402. The court went on to say that he "asserts a claim to the fund that is adverse to that of the defendant claimants." *Id.* at 403. This holding is consistent with the decription of an interested stakeholder's status as a claimant in *California v. Texas.*[3]

---

3. "The bill in the nature of interpleader . . . allows an interested claimant to seek adjudication of all claims to the fund including his own." 437 U.S. 601, 605, n. 5 (1978), citing *Texas v. Florida,* 306 U.S. 398, 406 (1939). (Stewart, J., concurring.)

Petitioners, however, assert that this holding "would have a radical, and plainly undesirable, effect on fundamental principles of federal jurisdiction . . . ," thus warranting review by this Court. (Pet. 16) They assert that considering an interested stakeholder's citizenship for diversity purposes would potentially turn every bilateral dispute into an interpleader action, would give the interested stakeholder the opportunity to bring the action in his own forum, and would "radically" expand interpleader as a remedy. (Pet. 11, 16, 17)

A bilateral dispute does not, by definition, require interpleader resolution. In the "garden-variety dispute between two parties" described by Petitioners (Pet. 16), the stakeholder is not confronted with the threat of vexatious litigation and multiple liability, a necessary element for interpleader jurisdiction. *See, e.g., Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75 (10th Cir. 1955); *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739 (5th Cir. 1955); *Pan Am. Fire & Cas. Co. v. Revere*, 188 F.Supp. 474 (E.D. La. 1960). Here, however, in addition to Alvord's claim, Lummis is exposed to the mutually exclusive tax claims asserted by White and Bullock (Texas taxing officials) and Cory (the other California taxing official). This proceeding therefore is certainly not a bilateral dispute but rather is, as the Court of Appeals noted, a bill in the nature of interpleader. *Lummis v. White, supra*, at 401.

Petitioners express concern that the decision below unfairly permits an interested stakeholder to interplead out-of-state claimants in his own forum without any regard to their "prior contacts" with that forum. This is no different from the situation in any interpleader action in which one or more claimants are not residents of the forum in which the action is brought. Here, as there, the defendant

claimants would have available that change of venue relief contemplated by 28 U.S.C. § 1404(a), if another forum would be more appropriate.

Finally, it should be emphasized that considering the interested stakeholder's citizenship for diversity purposes does not impermissibly expand jurisdiction under the federal interpleader statute. This holding does not conflict with any prior decisions of this Court but instead is in accord with the line of cases in which this Court has interpreted the interpleader statute liberally in order to foster its use as an equitable remedy. *See, e.g., State Farm, Fire & Cas. Co. v. Tashire, supra; Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *see also Haynes v. Felder*, 239 F.2d 868 (5th Cir. 1957); *Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 477, n. 8 (E.D. La. 1960); 7 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1710, at 406 (1972).[4]

The Court of Appeals, finding the requisite minimal diversity between Lummis and Alvord, found it unnecessary to rely on the alternative basis for diversity that exists between the state taxing officials of California and Texas. As four Justices of this Court noted in *California v. Texas*, this action does not involve a suit for recovery of money damages from the state treasury of either California or Texas. This is a suit against state taxing officials

4. What has been suggested to be a contrary view on the question of whether an interested stakeholder's citizenship may be considered appears at 3A Moore's FEDERAL PRACTICE, § 22.09[1] (1979). An examination of this discussion of the subject, however, reveals that this treatise is providing an historical review of the earlier lower court cases which, in order to sustain jurisdiction, held an interested stakeholder's citizenship irrelevant under statutory interpleader.

for prospective relief and, therefore, their citizenship controls for diversity purposes. The Court has before it adverse claimants who are citizens of at least three different states. The minimal diversity requirement for statutory interpleader is clearly present and review by this Court is unnecessary.[5]

2. THE RECENT CHANGE IN THE CALIFORNIA INHERITANCE TAX LAW DOES NOT AFFECT THE HOLDING OF THE COURT OF APPEALS THAT ALVORD IS A CITIZEN OF CALIFORNIA FOR DIVERSITY PURPOSES.

Petitioners contend that, because of a recent change in California inheritance tax law (which became effective January 1, 1981, two and a half years after commencement of this action), Alvord is no longer an adverse claimant in the interpleader action and his citizenship may not be considered in determining jurisdiction in this case.[6] They urge that *Huddleston v. Dwyer*, 322 U.S.

---

5. Petitioners urge, as a separate reason for granting certiorari, that they should not be required to submit their tax claim to a jury composed of citizens of Texas. They have cited no authority which elevates this venue question to the stature of a reason for granting certiorari. Further, "the very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716, n. 6 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975); *see, e.g., Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 111 (1945). Petitioners' assertion is premature and speculative; there has been no showing that an impartial jury cannot be empaneled in the judicial district where this action was brought.

6. At the time the interpleader action was filed, the California inheritance tax law provided that inheritance taxes were to be paid, in the first instance, to the county treasurer of the county where a decedent was domiciled at death, and the county treasurer would in turn remit the tax to the state controller. The county treasurer would retain a percentage as a "commission." The inheritance tax is now paid directly to the controller.

232 (1944), requires a reexamination, in light of the California statutory change, of the Court of Appeals' finding of diversity jurisdiction. *Huddleston*, however, stands for the proposition that a federal appellate court is required to apply substantive state law then existing when it is reviewing issues which are governed by state law. However, the question of diversity jurisdiction in a federal statutory interpleader action, which is in issue here, is governed not by state law but by federal law. 28 U.S.C. §§ 1332, 1335; *see, e.g., Smith v. Sperling*, 354 U.S. 91 (1957). Thus, *Huddleston* is inapplicable to this proceeding and no reexamination of the holding of the Court of Appeals is necessary.

The fact that California legislature may have modified the inheritance tax law has no effect on jurisdiction in this action. It has long been held in diversity cases that "jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan v. Torrance*, 9 Wheat (22 U.S.) 537, 539 (1824), Marshall, J.). This represents a sound policy decision that diversity jurisdiction should be found to exist or not to exist at the time a suit is commenced. "This approach provides maximum stability and certainty to the viability of the action and minimizes repeated challenges to the court's subject matter jurisdiction." 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3608, at 656 (1975). Because diversity jurisdiction is determined at the time a suit is commenced,[7] and because Alvord was an interpleader claimant adverse and diverse to Lummis at commencement of the suit, proper federal interpleader

7. An action in federal court is commenced with the filing of the complaint. Rule 3, FED. R. CIV. P.

jurisdiction attached at that time and still exists in this action. *See, e.g., Smith v. Sperling, supra; Hardenbergh v. Ray,* 151 U.S. 112 (1893).

The statutory change reflects a legislative assignment of Alvord's claim (collection of the California inheritance tax and retention of a commission) to the controller who now collects the inheritance tax.[8] The change has not altered the nature of this action. The underlying basis of Alvord's claim and Cory's claim are the same—that Hughes was domiciled in California at death. Controller Cory, of course, continues to assert this claim as before. Unlike the situation in *Kennametal, Inc. v. International Union,* 161 F. Supp. 362 (W.D. Pa. 1958), cited by Petitioners, no claim against the fund has been abandoned; the same three competing domicile claims which existed at the commencement of this action are still present.

This transfer of interest from Alvord to Cory may be compared to situations where a diverse party's interest shifts to a non-diverse party without affecting diversity jurisdiction. For example, where, during the pendency of a suit, a diverse tenant's interest shifts to his non-diverse landlord, jurisdiction over the action remains. *Fred Harvey, Inc. v. Mooney,* 526 F.2d 608 (7th Cir. 1975); *accord, Hardenbergh v. Ray,* 151 U.S. at 118. Similarly, in *Television Reception Corp. v. Dunbar,* 426 F.2d 174 (6th Cir. 1970), the original diverse party assigned his

8. It is not suggested that there was a sinister motive behind the change in the California tax law. Whatever the motive, the change in law raises the troublesome problem that, if the general rule is ignored or did not exist, state legislatures could exempt officials from suit in federal court by eradicating or otherwise altering the officials' duties after commencement of an action.

interest to a non-diverse corporation. In rejecting the plaintiff's contention that the assignment to the non-diverse corporation destroyed diversity jurisdiction, the court reiterated the general rule that

> federal jurisdiction is tested according to the facts as they exist at the time an action is initiated and that diversity jurisdiction, once acquired, is not defeated by events occurring subsequent to the commencement of the action. (Citations omitted.) *Id.* at 177.

See also Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970).

Petitioners contend that several categories of situations exist in which federal courts will redetermine diversity after commencement of an action. (Pet. 19-21) Each of these situations, however, involves the application of Rule 19, FED. R. CIV. P., principles to non-diverse parties. If the non-diverse party is indispensable the action must be dismissed. On the other hand, if the non-diverse party is found not to be indispensable, that party will be dismissed in order to preserve jurisdiction. In effect, the posture of the case *after* all indispensable parties have been joined, or non-indispensable parties dismissed, is the critical time as far as a determination of diversity jurisdiction is concerned, because this is the first time at which the case has been structured as it should have been at commencement. Rule 19 and the principles of indispensability have no application in the situation which exists in this case, where the interest of one diverse party is transferred to another party, and the nature of the action remains the same. There was no

need, therefore, for the Court of Appeals to reconsider the issue of jurisdiction. Because jurisdiction was unaffected by the change in California law, Petitioners' Motion For Leave To File Petition For Rehearing Out Of Time was properly denied by the Court of Appeals.

More fundamentally, under Supreme Court Rule 17, the effect of the change in California law on diversity jurisdiction in this action is not an issue which requires review by this Court. The case as structured by the Court of Appeals will not arise in the future because of the change in California law eliminating Alvord as collector of the California inheritance tax. Since the issue of Alvord's diversity cannot recur, the question is therefore not one of public importance. Where a statutory change, occurring subsequent to commencement of litigation, confines the impact of the issue presented to the Court to the case at bar, the issue does not merit consideration by this Court. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *District of Columbia v. Sweeney*, 310 U.S. 631 (1940), *denying cert. to* 113 F.2d 25 (D.C. Cir. 1940). As noted in *Rice*:

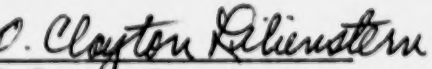
> A . . . question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit for the benefit of the particular litigants. (Citations omitted.) "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. (349 U.S. at 74)

CONCLUSION

This case does not present the appropriate vehicle for examining broad-ranging principles of federalism concern-

ing the resolution of interstate death tax controversies. Uniquely structured as it is, this case, after two and a half years, is on a track toward resolution and does not require review by this Court. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,



O. CLAYTON LILIENSTERN
PATRICIA A. STEVENSON
ANDREWS, KURTH,
CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002
(713) 652-2412

Of Counsel:
PROFESSOR
JAMES WILLIAM MOORE
New Haven, Connecticut

R. JAMES GEORGE, JR.
JOHN M. HARMON
GRAVES, DOUGHERTY,
HEARON & MOODY
2300 Austin National Bank
Tower
Austin, Texas 78701
Attorneys for Respondent, William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr., Deceased.

Office-Supreme Court, U.S.
FILED
APR 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF ON CERTIORARI

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Inheritance & Gift Tax
Office of the Controller
State of California

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN LEE MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, CA 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8422

Attorneys for Petitioners
**Counsel of Record*

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. THE ISSUE OF WHETHER THIS COURT OR A FEDERAL DISTRICT COURT SHOULD RESOLVE INTERSTATE DEATH TAX CONTROVERSIES IS BOTH WORTHY OF REVIEW AND SQUARELY PRESENTED BY THIS CASE 1

II. THIS ACTION DOES NOT MEET THE JURISDICTIONAL PREREQUISITES OF THE FEDERAL INTERPLEADER ACT 6

III. THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION ON VENUE . 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — PAGE

Ames v. *Kansas*, 111 U.S. 449 (1884) 3
Arizona v. *California*, 373 U.S. 546 (1963) 6
Case v. *Bowles*, 327 U.S. 92 (1946) 2, 5
Edelman v. *Jordan*, 415 U.S. 651 (1974) 1, 8
Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) 10
Minnesota v. *United States*, 125 F.2d 636 (8th Cir. 1942) 2, 5
Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537 (1824) 6, 7
United States v. *California*, 297 U.S. 175 (1936) 2, 3, 5
United States ex rel. Chandler v. *Dodge County*, 110 U.S. 156 (1884) 3
United States v. *Tynen*, 78 U.S. (11 Wall.) 88 (1871) 3
United States v. *Yuginovich*, 256 U.S. 450 (1921) 3
Worcester County Trust Co. v. *Riley*, 302 U.S. 292 (1937) .. 8

STATUTES AND REGULATIONS

28 U.S.C. § 341 (1940) 2, 3
28 U.S.C. § 1251(a) 1, 2, 3, 4, 5, 6
28 U.S.C. § 1335 ..... 1, 2, 3
28 U.S.C. § 1335(a)(1) 9
28 U.S.C.A. § 1251, note 4
Act of June 25, 1948, c. 646, 62 Stat. 927 3
Cal. Rev. & Tax. Code § 14322 9
Diplomatic Relations Act, Pub. L. 95-393, § 8(b), 92 Stat. 810 (1978) 4

OTHER AUTHORITIES

1978 U.S. Code Cong. & Admin. News 1935, 1946 4
P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98 (2nd ed. 1981 Supp.) 6
Stern and Gressman, SUPREME COURT PRACTICE 439 (5th ed. 1978) 2

I.

THE ISSUE OF WHETHER THIS COURT OR A FEDERAL DISTRICT COURT SHOULD RESOLVE DEATH TAX CONTROVERSIES BETWEEN STATES IS BOTH WORTHY OF REVIEW AND SQUARELY PRESENTED BY THIS CASE.

The Briefs in Opposition filed by the Texas taxing officials, Respondents White and Bullock, ("Tex. Br.") and by Respondent Lummis, ("Est. Br.") contend that because the Court of Appeals premised jurisdiction of this case on the now repealed provisions of California law which gave Petitioner Alvord a share of the California inheritance tax, the decision below is limited to the facts of this case and thus unworthy of review. (Tex. Br. 5-10; Est. Br. 5-7).

This contention lacks merit. This case squarely presents an issue of national importance: whether the Federal Interpleader Act (28 U.S.C. §1335) may be used to resolve an interstate dispute over Howard Hughes' domicile notwithstanding this Court's original exclusive jurisdiction of "controversies between two . . . States." 28 U.S.C. § 1251 (a). This issue transcends the factual underpinnings of the Court of Appeals' holding: its resolution does not depend on the intricacies of the Federal Interpleader Act or the vicissitudes of California's inheritance tax procedure. Resolution of this issue is necessary to provide guidance for states, executors and administrators of estates, and attorneys providing premortum counseling. *See* Pet. 14 n.15. Even Respondent Lummis concedes that "review by this Court may be warranted" of "the problem of interstate death tax controversies." (Est. Br. 7). This case squarely presents that problem, because the Court of Appeals' decision is wholly at odds with the exclusive grant of jurisdiction to this Court to resolve such controversies.[1]

Respondents White and Bullock contend that this case does not present a controversy between states. (Tex. Br. 12).

[1] Both Briefs in Opposition assail Petitioners for failing to raise this precise issue in the lower courts. (Tex. Br. 4, 12 n.5; Est. Br. 6). The charge is true, but irrelevant, since jurisdictional issues may be raised at any time, even in this Court. *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). The change in Petitioners' position is not as great as Respondents imply, since Petitioners have always taken the position that the action, as presently framed, cannot be maintained under 28 U.S.C. § 1335. Petitioners' failure to raise the issue earlier is frankly the result of their failure to see it.

But, as shown in the Petition (Pet. 8-9 & n.10), now that interpleader has been invoked, California and Texas are directly adverse, not only to the Estate, but also to each other. The Petition and Briefs in Opposition clearly show that Texas and California have taken diametrically opposed positions on every issue involved in this litigation: jurisdiction, venue, and the merits.[2]

The Texas taxing officials further argue that even if this suit is an interstate controversy (and thus within the grant of exclusive original jurisdiction under 28 U.S.C. § 1251 (a)), district court jurisdiction of this case is nonetheless proper under 28 U.S.C. § 1335. (Tex. Br. 13-14). Respondents rely for this proposition on three cases[3] which upheld district court jurisdiction of suits by the United States against states despite the fact that the then-existing statute providing for original jurisdiction in this Court (28 U.S.C. § 341 (1940)), gave this Court exclusive jurisdiction "of all controversies of a civil nature where a state is a party . . . ." Respondents argue that a similar implied exception to Section 1251(a) applies to this case.

These cases do not carry the weight which Respondents seek to place upon them. They merely hold that the broad grant of exclusive original jurisdiction contained in prior Section 341—which dated back to the Judiciary Act of 1789—was superseded by specific and subsequent Congressional grants of jurisdiction to the district courts to consider cases brought by the United States under particular federal regulatory schemes. This principle is inapplicable here, for several reasons.

First, these cases turn on the principle that, in each, the statute granting district court jurisdiction had been enacted *later*

---

[2] Respondents contend that Petitioners have acted improperly by styling this case *Controller of the State of California* v. *Attorney General of the State of Texas* and that the appropriate style should be *Cory* v. *Lummis*. But "counsel is not bound by the caption used in the court below; he is free to clarify or improve it so as to portray accurately the adversary position of the contending parties before the Court." Stern and Gressman, SUPREME COURT PRACTICE 439 (5th ed. 1978). As this case now stands, Petitioners are on one side of the issues tendered to the Court, while the Texas taxing officials are on the other. The caption of the case thus "reflects the actual alignment of the parties as they appear before [the] Court." *Id.*

[3] *United States* v. *California*, 297 U.S. 175 (1936); *Case* v. *Bowles*, 327 U.S. 92 (1946); *Minnesota* v. *United States*, 125 F.2d 636 (8th Cir. 1942).

than the original jurisdiction statute and thus carved out an implied exception to it.[4] In this case, however, the situation is exactly the reverse, since the Federal Interpleader Act was adopted in 1936, twelve years before the Court's exclusive jurisdiction over controversies between states was made explicit by Congress. Act of June 25, 1948, c. 646, 62 Stat. 927. The earlier statute cannot have impliedly repealed the latter.

Second, because Congress is free to make the original jurisdiction exclusive or concurrent (*Ames* v. *Kansas,* 111 U.S. 449 (1884)), whether Section 1335 provides an exception to Section 1251(a) is ultimately a question of legislative intent. Yet Respondents have made no showing that the Interpleader Act was intended to achieve this result. And the legislative history of Section 1251(a)—as well as its plain language—demonstrates that Congress meant to provide this Court with jurisdiction over *all* controversies between states. Section 1251(a) gives this Court "original *and exclusive* jurisdiction over *all* controversies between two ... States." (Emphasis added). It would be difficult to imagine language which more clearly evinced a Congressional disinclination to foster judicially-created exceptions to the grant of exclusive jurisdiction.

The 1948 Reviser's Note to 28 U.S.C. § 1251(a) fully supports the conclusion that Congress meant what it said. The note indicates that Congress sought to put the exclusive character of the Court's original jurisdiction over controversies between states on a firm and unambiguous footing while, at the same time, it ratified the holding of the cases cited by Respondents by providing for original but *not* exclusive jurisdiction over suits between the United States and the states. Indeed, the revisers were quite aware of the ambiguity in the Court's

[4] Thus, in the leading case, *United States* v. *California, supra,* the Court cited three cases for the proposition that Section 341's grant of exclusive original jurisdiction was superseded by the grant of jurisdiction to the district courts under the Federal Safety Appliance Act. *United States* v. *Yuginovich,* 256 U.S. 450 (1921); *United States ex rel. Chandler* v. *Dodge County,* 110 U.S. 156 (1884); and *United States* v. *Tynen,* 78 U.S. (11 Wall.) 88 (1871). None of these cases has anything to do with jurisdiction; rather, they all stand for the principle that "a later statute repeals former ones when clearly inconsistent with the earlier enactments." *United States* v. *Yuginovich,* 256 U.S. at 463, citing *United States* v. *Tynen, supra.* Hence, the linchpin of these cases is not a jurisdictional principle, but rather a canon of statutory construction which, as shown in text, is inapplicable to this case.

revisers were quite aware of the ambiguity in the Court's exclusive original jurisdiction which the cases cited by Respondents (and others) had created *and sought to eliminate it*, by splitting the original jurisdiction into exclusive and

The latest revision of Section 1251(a) underscores the importance which Congress has attached to the Court's exclusive jurisdiction over controversies between states. In 1978, because Congress felt that the Court "should not be burdened with such litigation on its original docket" (1978 U.S. Code Cong. & Admin. News 1935, 1946), Section 1251 was amended to make the Court's original jurisdiction over actions and proceedings against ambassadors and public ministers of foreign states concurrent rather than exclusive. Diplomatic Relations Act, Pub. L. 95-393, § 8(b), 92 Stat. 810 (1978). Yet Congress, obviously aware of this Court's docket problems, did not disturb the grant of exclusive original jurisdiction over controversies between states. Thus, Congress' last word on the subject was to confirm that this Court is obliged to exercise exclusive jurisdiction over all such controversies otherwise properly before it.

Third, the cases cited by Texas are distinguishable for yet another reason. Each case involved a statute which granted jurisdiction to the district courts of actions brought by the

---

[5] The note provides, in relevant part:

"Sections 341 and 371 of Title 28, U.S.C. 1940 ed., did not confer *expressly* exclusive jurisdiction on the Supreme Court in civil cases between states . . . *as has been provided in subsection (a) (1) of the revised section. The language at the beginning of said section 341* [*i.e.*, the language involved in *United States* v. *California, supra*, and the other cases], *for which said subsection has been substituted, was ambiguous* and made it appear that an action by a State against the United States would be within the exclusive jurisdiction of the Supreme Court. However, in *U.S.* v. *Louisiana*, 1887, 8 S.Ct. 17, 123 U.S. 32, 31 L.Ed. 69, the Supreme Court, in a case appealed from the Court of Claims, held to the contrary.

"So, also, in actions by the United States to condemn lands of a State or to enforce penalties for violation of a Federal statute against a State-owned utility, the United States district courts have jurisdiction. *See United States* v. *State of Utah* [283 U.S. 64 (1931)]; *United States* v. *4,450.72 Acres of Land, Clearwater County, State of Minnesota*, D.C. Minn. 1939, 27 F. Supp. 167, affirmed 125 F.2d 636; *United States* v. *State of California*, [297 U.S. 175 (1936)]." (28 U.S.C.A. § 1251, note. (Emphasis added)).

United States pursuant to a specific federal regulatory scheme. The exceptions to the Court's exclusive jurisdiction created by these cases were thus quite narrow and tailored to the federal government's need to have a convenient forum in which to try essentially local controversies.[6]

The exception to exclusive jurisdiction which the Texas taxing officials are attempting to create here is something else again. Unlike the statutes involved in the three cases, which could only be invoked by the United States, the Interpleader Act may be invoked by any private party meeting the minimal jurisdictional prerequisites. Under Respondents' logic, any private party faced with conflicting state claims such as double taxation or double escheat could compel sovereign states to litigate against each other in actions not of their own making and in forums not of their own choosing. No such exception to the grant of exclusive jurisdiction over controversies between states has ever been or should now be implied.

Fourth, and finally, Respondents' argument proves too much. If the general language of the Federal Interpleader Act supersedes the exclusivity provision of Section 1251(a), then surely other grants of district court jurisdiction create similar exceptions. For example, if one state sought to sue another for an antitrust violation or a violation of a federal statute otherwise affecting commerce (*see, e.g., California* v. *Texas*, No. 87,

---

[6] All three of these cases involved controversies which, although between the United States and a state, involved only a local matter. Thus the Court noted in *United States* v. *California* that cases arising under the Safety Appliance Act "often require[] the presence, as witnesses, of railroad workers, shippers and others of the locality." 297 U.S. at 188. *Case* v. *Bowles* involved a sale of state land, obviously a matter of essentially local import. And *Minnesota* v. *United States* was a condemnation proceeding, which the Court of Appeals held was "the sort of proceeding which, for the convenience of all parties interested, should be brought in the district where the land is located." 125 F.2d at 639. Thus, in each of these cases, there were "considerations which undoubtedly led to the command that the suit should be brought in the district court of the 'locality' where [the events in controversy] occur[red]." *United States* v. *California*, 296 U.S. at 188.

This action, in contrast, is hardly a local controversy. In the last ten years of his life alone, Howard Hughes lived in three states and five foreign countries. Relevant witnesses are scattered throughout the United States; in fact, of the seventy-three witnesses who appeared at the state court domicile trial, thirty-three (46%) lived in California while only fifteen live in Texas. R.I. 86, 97 & Exhibits A-1 and A-2. Thus, the strong policy interest in having local controversies settled in a local district court is not present here.

Original), under Respondents' theory, the matter could be heard in a federal district court. The same would be true of a suit brought by one state against another which involved a federal question. *E.g., Arizona* v. *California,* 373 U.S. 546 (1963). Respondents' theory would turn the exclusivity provision of Section 1251(a) into a dead letter.

Since the Interpleader Act is not an implied exception to Section 1251(a), the Court of Appeals' decision falls afoul of this Court's exclusive original jurisdiction to resolve controversies between states. This Petition thus squarely presents the Court with an opportunity to determine how interstate domicile disputes shall be resolved. The leading casebook on federal courts recently noted that "[t]he question of the Court's jurisdiction to adjudicate cases involving conflicting state death tax claims has been cast into confusion by *California* v. *Texas.*" P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98 (2nd ed. 1981 Supp.). This case presents the Court with an opportunity to dispel that confusion once and for all.

II.

THIS ACTION DOES NOT MEET THE JURISDICTIONAL PREREQUISITES OF THE FEDERAL INTERPLEADER ACT.

Even if Section 1251(a) did not prevent the district courts from resolving interstate domicile disputes, the Federal Interpleader Act would not provide jurisdiction. The state taxing officials who will necessarily be the principal defendants in such cases are not "citizens of a state" for diversity and interpleader purposes because their states—which have no citizenship—are the real parties in interest and thus the true interpleader claimants. (Pet. 10-12). The Court of Appeals found jurisdiction in this case only because, at the time the Complaint was filed, Petitioner Alvord would have received a small percentage of the California tax if Hughes were determined to have been a California domiciliary. Since this aspect of California law has now been repealed (Pet. App. 36i, 38i), the Court of Appeals erred in holding that the District Court had interpleader jurisdiction of this action. (Pet. 18-23).

Respondents White and Bullock respond to this contention merely by citing *Mollan* v. *Torrance,* 22 U.S. (9 Wheat.) 537

(1824), and cases following, which hold that jurisdiction depends on the state of affairs at the time the action is commenced. (Tex. Br. 6-7). This general statement fails altogether to respond to the score of cases cited in the Petition which show that, despite that rule, the addition or deletion of a party after the filing of the complaint forces a redetermination of diversity jurisdiction. (Pet. 19-20).

Respondent Lummis's response is more sophisticated. He contends that Petitioner Alvord's interest has been transferred to Petitioner Cory and that this case is therefore analogous to cases which have held that assignment of a claim from a diverse to a non-diverse party will not oust the court of jurisdiction. (Est. Br. 13-14).

This argument fundamentally mischaracterizes California's revision of its inheritance tax procedure. Petitioner Alvord's claim has not been assigned to Petitioner Cory. Instead, Petitioner Alvord's claim has simply disappeared. Even if Hughes is ultimately found to have been a California domiciliary, Petitioner Alvord's alter ego—the County of Los Angeles—will not receive a penny. It is therefore incorrect to say, as does Respondent, that "no claim against the fund has been abandoned . . . ." (Est. Br. 13). Petitioner Cory has appeared in this action not as the "assignee" of a claim previously held by Petitioner Alvord, but because he represents California's interest in this litigation and has from its inception when he was named as a party by Respondent Lummis.

The analogy to assignment overlooks the fact that these Petitioners are state and local officials, not private citizens. Unlike private parties, they are not free to exchange causes in action at will, but rather have only such duties and responsibilities as may be granted by statute. The action of a sovereign state in removing previously vested responsibilities from a public officer simply cannot be analogized to the assignment of a claim between two private parties. The cases cited by Respondent Lummis are therefore irrelevant.[7]

[7] The fear voiced by Respondents (Est. Br. 13 n.8; Tex. Br. 7) that state officials will shift responsibilities to avoid federal jurisdiction is chimerical. After all, federal courts have been able since *Ex Parte Young* to restrain unconstitutional conduct by state and local officials. Yet Respondents have cited no case where a state sought to evade federal jurisdiction by evasive transfers of responsibility from one official to the next. Indeed, Respondent Lummis concedes that no such motive was present here. (Est. Br. 13 n.8).

III.

THE WRIT SHOULD ISSUE TO REVIEW THE COURT OF APPEALS' DECISION ON VENUE.

If, despite the arguments presented above, interstate controversies over domicile are to be heard in federal district court, the next logical question is which district court shall hear them. The Petition therefore urged the Court to review the Court of Appeals' decision that California must litigate its dispute with Texas before a jury composed of Texas citizens. (Pet. 23-30).

The most interesting fact about Respondents' submissions on this question is not what has been said, but who has said it. Respondent Lummis, who chose the Texas forum, treats the venue issue in a footnote. (Est. Br. 11 n.5). Conversely, Respondents White and Bullock, the Texas taxing officials—who did not choose the forum, but who contend that Texas was Hughes' domicile—devote seven pages to the issue. (Tex. Br. 14-21). Indeed, the Texas officials state that they have decided not to seek review of the Court of Appeals' opinion (despite what they claim is an "obvious conflict" between that decision and *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292 (1937)),[8] because they have concluded that Texas is "the most appropriate and efficient forum" for the litigation. (Tex. Br. 11). The fact that it is the Texas taxing officials, rather than Respondent Lummis, who have taken up the cudgels on the venue issue illustrates quite clearly which parties stand to benefit most from a Texas forum.[9]

The certworthiness of the issue is plain. Respondent Lummis himself admits that "the problem of interstate death tax controversies" may warrant review. (Est. Br. 7). A central

---

[8] This conflict raises an Eleventh Amendment issue which is jurisdictional (*Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974)) and may thus be reviewed by the Court despite the parties' failure to raise it.

[9] It may be wondered why Respondent Lummis, who claims Nevada as the domiciliary state, should have filed this action in Texas, if a Texas forum is as potentially unfair as Petitioners claim. While Petitioners cannot speak to the subjective motivations which lay behind the filing of this lawsuit in Austin, it is worth noting that because the Texas inheritance tax rate is only 16% (the amount of the federal tax credit), it will make no difference to the Estate whether Texas or Nevada is determined to be Hughes' domicile. From the viewpoint of minimizing state inheritance taxes, the Estate's primary interest is to defeat California, since its 24% tax, unlike the 16% Texas tax, will not be paid by the Estate exclusively from dollars which would otherwise go to the federal government. Indeed, it may well be that the Estate saw a Texas forum as the surest opportunity to defeat the California claim.

aspect of that problem is providing the contending states with a forum which properly respects their status as competing sovereigns. Should the Court rule that interstate domicile disputes are within its exclusive original jursidiction, that problem will be solved. But if it holds that disputes of this kind may be settled in a district court, the problem of providing the states with a "neutral forum" will remain.[10]

Respondents White and Bullock urge that voir dire and instructions from the bench will eliminate any possible bias. (Tex. Br. 19). This might be an appropriate response if the only objection to trial in Texas were prejudicial pretrial publicity. But neither voir dire or jury instructions will avoid the submission of the case to jurors who have (and whose family, friends, neighbors and co-citizens also have) a significant pecuniary interest in the outcome. Nor will they remedy the affront to state sovereignty which will occur if California is compelled to litigate its dispute with Texas in that state or the appearance of injustice which would inevitably result should a Texas jury return a verdict favoring its home state.[11]

---

[10] Respondents White and Bullock chide Petitioners for having moved in the alternative to transfer this action to California, contending that this alternative motion somehow undercuts Petitioners' insistence on a "neutral forum." (Tex. Br. 4). But the motion to transfer this action to Los Angeles was clearly framed as the least preferable of the two possible venue transfers; it was expressly premised on the assumption that the district court had rejected Petitioners' submission that a neutral forum was required. The alternative motion merely contended that if trial were to be held in a "non-neutral" forum, Texas was no more entitled to a Texas forum than California was entitled to a California one. *See* Reply Brief of Cross-Appellants filed in the Court of Appeals at 16-17 n.16.

[11] Respondents also argue that the District of Colorado is not a permissible transferee forum. (Tex. Br. 15-17). If they were right, then the difficulty of finding a neutral forum under the Federal Interpleader Act as presently constituted would be an additional reason why that remedy is unsuitable for resolving death tax controversies between states. (Pet. 12-14). But their contention is erroneous. The twenty-two persons whom Petitioners sought to add below are believed by the Estate's Administrators to be the legitimate heirs of Howard Hughes. They are clearly "claimants" within the meaning of the Interpleader Act since they "may claim" an interest in money or property within Respondent Lummis' custody or possession. 28 U.S.C. § 1335(a)(1). And the addition of the heirs as parties is required, despite the presence of the Administrators, because the California inheritance tax falls on the heirs personally and extends to their personal assets—as to which no administrator could bind the heirs—as well as the assets they might receive from the Estate. Cal. Rev. & Tax. Code § 14322. The heirs could and should have been joined, thus making possible the transfer to a neutral forum which Petitioners have sought throughout this litigation.

Finally, the Texas officials contend that this case should not be transferred to Colorado because the burdens of jury duty "ought not to be imposed upon the people of a community which has no relation to the litigation." (Tex. Br. 20, citing *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508-09 (1947)). While there is undoubtedly a "local interest", as the Court said in *Gilbert,* "in having localized controversies decided at home" (330 U.S. at 509), this action is not a "localized controversy". *See* n. 6, *supra.* The interest of justice in providing an impartial forum cannot be thwarted merely because to do so would transfer litigation from a forum with too much "local interest" to a disinterested one. It is precisely the lack of connection between this litigation and the District of Colorado which makes that forum a suitable one for trial of this interstate controversy.

CONCLUSION

The Petition should be granted.

DATED: April 27, 1981.

Respectfully,

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Inheritance & Gift Tax
Office of the Controller
State of California

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN LEE MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Attorneys for Petitioners Cory and Alvord
**Counsel of Record*

Office-Supreme Court, U.S.
FILED
APR 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1556

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONTROLLER OF THE STATE OF CALIFORNIA AND
COUNTY TREASURER OF THE COUNTY OF
LOS ANGELES, PETITIONERS

v.

ATTORNEY GENERAL OF THE STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Case:

California v. *Texas*, 437 U.S. 601 2

Statutes:

Declaratory Judgment Act, 28 U.S.C. 2201 3

Federal Interpleader Act, 28 U.S.C. 1335 .... 1, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1556

CONTROLLER OF THE STATE OF CALIFORNIA AND COUNTY TREASURER OF THE COUNTY OF LOS ANGELES, PETITIONERS

v.

GENERAL OF THE STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners seek review of the decision below holding that the Federal Interpleader Act (28 U.S.C. 1335) conferred jurisdiction upon the district court to hear this suit, brought by the administrators of the estate of Howard Hughes in the United States District Court for the Western District of Texas to resolve conflicting claims of domicile-based inheritance taxes asserted by the states of Texas and California.[1]

1. The pertinent facts are as follows: The decedent, Howard Robard Hughes, Jr., died on April 5, 1976, leaving a substantial estate consisting primarily of the stock of Summa Corporation, a Delaware corporation wholly owned by him (Pet. App. 2a). Administrators were appointed in

---

[1]On March 12, 1981, petitioners filed a motion for leave to file a complaint invoking the original jurisdiction of this Court (see No. 88, Original).

each of five states where the decedent owned property: Texas, California, Nevada, Delaware and Louisiana.[2] Texas and California claim the decedent as a domiciliary and each seeks to impose its state death taxes on the estate's tangible assets located within its borders and on all the estate's intangible assets. The administrators claim that at the time of his death decedent was domiciled in Nevada, a state which imposes no death taxes, and that if both Texas and California impose their state death taxes, the total state and federal taxes due will exceed the gross estate (Pet. App. 2a-3a).

In proceedings instituted in the state courts of Texas, a jury determined that decedent had been domiciled in Texas. Approximately three days before that trial began, the State of California moved for leave to file a complaint invoking this Court's original jurisdiction (Pet. App. 3a). The Court denied the motion. In concurring opinions, Justices Brennan, Stewart, Powell and Stevens suggested that the administrators might obtain a domicile determination binding on both states by instituting a federal interpleader action. *California* v. *Texas*, 437 U.S. 601, 601-616 (1978).

The Texas administrator thereafter instituted the present suit in the United States District Court for the Western District of Texas. The official Texas defendants moved to dismiss the suit for lack of jurisdiction; the official California defendants moved to add certain purported heirs and defendants and to change venue. In accordance with the stipulation of the parties, the district court first considered the motions filed by the California defendants. It denied the

---

[2] A Texas court appointed William Rice Lummis and Annette Gano Lummis as temporaty co-administrators. Annette Gano Lummis died and her powers vested in William Rice Lummis. In Delaware and Louisiana, Lummis was appointed administrator. Richard Gano was appointed administrator in California. The First National Bank of Nevada was originally appointed administrator in Nevada, but Lummis was subsequently named co-administrator (Pet. App. 2a & n.2).

motion to add defendants, as well as the motion to change venue (Pet. App. 1e-6e, 1f-3f). Thereafter, the California defendants sought to dismiss the suit (Pet. App. 1d). While the motions to dismiss were pending, the administrators amended their complaint to add the United States and certain other administrators as defendants. The United States was granted an extension of time within which to file its answer until after the district court had disposed of the pending motions to dismiss. Subsequently, the district court dismissed the case on the ground that the diversity requirements of 28 U.S.C. 1335 were not satisfied (Pet. App. 1d-7d, 1g-2g, 1h). As a consequence, the United States had no occasion to file an answer or other responsive pleading.

On appeal, the Texas defendants urged that the district court had correctly dismissed the complaint. The official California defendants argued that the district court had erred in refusing to add defendants and to change venue. They alternatively argued that the district court properly dismissed the suit (Pet. App. 4a). In its brief to the court of appeals, the United States took no position with respect to whether the requisite diversity of citizenship of the parties existed. The government did maintain, however, that it should be dismissed as a party to the litigation because the estate's attempt to obtain an advance declaration of the decedent's domicile that would be binding on the United States for federal estate tax purposes was barred by the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201). The court of appeals reversed the district court's judgment that the requisite diversity between the parties did not exist and remanded the case for trial on the merits. Because the district court had not had the opportunity to consider the government's contention that the Declaratory Judgment Act barred the relief sought against the United States, the court of appeals declined to rule on the issue

until the district court decided it on remand (Pet. App. 13a & n.14).

2. Petitioners contend (Pet. 7-11) that the district court lacks jurisdiction to entertain this suit because it involves a controversy between two states which can only be resolved by this Court under its original jurisdiction.[3] They alternatively contend (Pet. 15-18) that the district court has no jurisdiction to hear this suit because the diversity requirements of 28 U.S.C. 1335 have not been met.

The United States took no position in either court below on whether the administrators properly invoked the federal interpleader statute in seeking to resolve the conflicting domicile claims of Texas and California. Since petitioners' contentions do not bear on the government's sole argument in this case that it should be dismissed as a party, the United States takes no position with respect to whether the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

---

[3]Petitioners have again sought to invoke the original jurisdiction of this Court. See page 1, note 1, *supra*.

DOJ-1981-04

Office-Supreme Court, U.S.
FILED
SEP 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-1556

In the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA, and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,

Petitioners,

v.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Petitioners

Of Counsel:
MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Tax Administration
Office of the State Controller
State of California

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, CA 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building, 12th Floor
Post Office Box 1148
Austin, Texas 78767
(512) 472-8422

Attorneys for Petitioners

**Counsel of Record*

SORG PRINTING COMPANY OF CALIFORNIA, 340 FIRST STREET, SAN FRANCISCO 94105

QUESTIONS PRESENTED

1. Whether an action against the taxing officials of two states to adjudicate their mutually inconsistent domicile-based death tax claims involves a "controvers[y] between two . . . States" within this Court's exclusive jurisdiction under 28 U.S.C. § 1251(a) and is thus outside the jurisdiction of a federal district court.

2. Whether the Federal Interpleader Act provides a basis for district court jurisdiction to resolve this controversy between two states concerning their conflicting domicile-based inheritance tax claims, even though neither state nor its taxing officials are "citizens of a state" for purposes of diversity and interpleader jurisdiction.

3. Whether an interpleader stakeholder with an interest in the fund at issue is a "claimant" within the meaning of the Federal Interpleader Act, so as to establish federal jurisdiction with a $500 jurisdictional minimum (and nationwide service of process) in cases where only one defendant-claimant is a citizen of a diverse state.

4. Whether this action, which does not involve a substantial claim that state officials are acting illegally and/or unconstitutionally, is barred by the Eleventh Amendment.*

5. Whether a change in California law which requires the dismissal of one of the two "claimants" whose presence was the original basis for jurisdiction deprived the district court of jurisdiction over this action.

6. Whether, in a controversy between two states over their conflicting domicile-based inheritance tax claims, venue should be transferred from a court sitting in one of those contending states so that the action may be heard in a forum whose residents have no personal interest in the cause of one of the claimant states.

---

*While this question was not presented in the Petition for Certiorari, it is jurisdictional (*Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974)), and may therefore be considered by the Court. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 (1980); *see* Stern and Gressman, SUPREME COURT PRACTICE 459 (5th Ed. 1978.)

PARTIES

There are two Petitioners, each appearing in his official capacity: Kenneth Cory, the Controller of the State of California, and H. B. Alvord, the County Treasurer of the County of Los Angeles. Respondents include Mark White, the Attorney General of the State of Texas; Bob Bullock, the Comptroller of the State of Texas; William Rice Lummis, as Texas Administrator of the Estate of Howard R. Hughes, Jr. (the Estate), as Nevada Co-Special Administrator of the Estate, as Louisiana Provisional Administrator of the Estate, and as Delaware Ancillary Administrator of the Estate; Richard Gano, the California General Administrator of the Estate; the First National Bank of Nevada, the Nevada Co-Special Administrator of the Estate; and the United States of America.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Summary of Argument	6
Argument	9
Introduction	9
I. District Court Jurisdiction Is Barred by 28 U.S.C. § 1251(a) Because This is a Controversy "Between Two . . . States" Within the Court's Exclusive Jurisdiction	17
II. This Action Does Not Meet the Jurisdictional Prerequisites of the Federal Interpleader Act	27
A. The Court of Appeals Erred in Holding That the Citizenship of a Stakeholder Should Be Considered in Determining Whether Interpleader Jurisdiction Exists	29
B. The Court of Appeals' Finding of Jurisdiction Has Been Superseded by Changes in California Law	32
III. This Action Is Barred by the Eleventh Amendment	36
IV. If Interpleader Jurisdiction Is Upheld, Transfer Under 28 U.S.C. § 1404(a) is Required	37
A. The Motion to Add Parties Should Have Been Granted	39
B. Transfer Under Section 1404(a) is Required	45
Conclusion	46

TABLE OF AUTHORITIES

CASES — Pages

Adams Express Co. v. Denver & Rio Grande Ry., 16 F. 712 (C.C.D. Colo. 1883) 34
Alderman v. Elgin, J. & E. R.R. Co., 125 F.2d 971 (7th Cir. 1942) 34
Allen v. Flournoy, 26 Cal. App. 3d 774, 87 Cal. Rptr. 275 (1972) 40
Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co., 204 F. Supp. 83 (D. Conn. 1962) 34
American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) .. 36
American Medicorp, Inc. v. Humana, Inc., 445 F. Supp. 573 (E.D. Pa. 1977) 39
Arizona v. California, 373 U.S. 546 (1963) 25
Arizona v. New Mexico, 425 U.S. 794 (1976) 18, 25, 26

Bastille Properties, Inc. v. Hometels of America, Inc., 476 F. Supp. 175 (S.D.N.Y. 1979) 39
Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912) 43
Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885 (5th Cir. 1968) 42
Brown v. Fisher Skylights, Inc., 31 F.R.D. 532 (E.D.N.Y. 1962) 45
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F. Supp. 485 (D. Md. 1962) 31
Bry-Man's, Inc. v. Stute, 312 F.2d 585 (5th Cir. 1963) 42

California v. Texas, 437 U.S. 601 (1978)
3, 10, 16, 18, 19, 24, 26, 36, 37, 41, 47
Capital Fire Ins. Co. v. Langhorne, 146 F.2d 237 (8th Cir. 1945) 45
Carlson v. Consumers Power Co., 164 F. Supp. 692 (W.D. Mich. 1957) 45
Case v. Bowles, 327 U.S. 92 (1946) 19, 24

TABLE OF AUTHORITIES Pages

Chance v. County Bd. of School Trustees, 332 F.2d 971 (7th Cir. 1964) 34
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 16
Clarkson Co. Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976) 33
Cohn v. Cohn, 20 Cal. 2d 65, 123 P.2d 833 (1942) 40
Connally v. Georgia, 429 U.S. 245 (1977) 12
Craig v. S. Natural Gas Co., 125 F.2d 66 (5th Cir. 1942).... 27

Dakota Livestock v. Keim, 552 F.2d 1302 (8th Cir. 1977).... 33
DeMiglio v. Paez, 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959) 18
Director, Office of Workers' Compensation Programs v. Rasmussen, 440 U.S. 29 (1979) 48
Drumright v. Texas Sugarland Co., 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927) 34

Edelman v. Jordan, 415 U.S. 651 (1974) 3, 36
Emerson Elec. Co. v. Black & Decker Mfg. Co., 606 F.2d 234 (8th Cir. 1979) 39
Epperson v. United States, 409 F.2d 98 (7th Cir. 1973) 12
Estate of Glassford, 114 Cal. App. 2d 181 (1952) 18
Estate of Hendricks, 11 Cal. App. 3d 204, 89 Cal. Rptr. 748 (1970) 40
Estate of Hite, 159 Cal. 392, 113 Pac. 1072 (1911) 40
Estate of McLaughlin, 243 Cal. App. 2d 516, 52 Cal. Rptr. 543 (1966) 40
Ex parte Young, 209 U.S. 123 (1908) 19, 36, 37

Fetzer v. Cities Serv. Oil Co., 572 F.2d 1250 (8th Cir. 1978) 34
Finn v. Am. Fire & Cas. Co., 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954) 34
Forest Oil Co. v. Crawford, 101 F. 849 (3d Cir. 1900).....34, 35

TABLE OF AUTHORITIES — Pages

Friedberg v. Santa Cruz, 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949) 18
Fryer v. Weakley, 261 F. 509 (8th Cir. 1919) 34

Gaddis v. Junker, 27 F.2d 156 (E.D. Tex. 1928) 34
Gottlieb v. Vaicek, 69 F.R.D. 672 (N.D. Ill. 1975) 42
Grady v. Irvine, 254 F.2d 224 (4th Cir. 1958), *cert. denied*, 358 U.S. 819 (1958) 35

Haas v. Jefferson Nat. Bank, 442 F.2d 394 (5th Cir. 1971) 33
Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F. Supp. 381 (N.D. Okla. 1978) 38
Hoffman v. Blaski, 363 U.S. 335 (1960) 37
Humble Oil & Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) 35
Hunt Tool Co. v. Moore, Inc., 212 F.2d 685 (5th Cir. 1954) 35

Illinois v. Milwaukee, 406 U.S. 91 (1972) 25
Int'l. Rediscount Corp. v. Hartford Acc. & Indem. Co., 425 F. Supp. 669 (D. Del. 1977) 45
Ipco Hospital Supply Corp. v. Les Fils d'Auguste Maillefer, 446 F. Supp. 206 (S.D.N.Y. 1978) 38

Johnson v. Riverland Levee Dist., 117 F.2d 711 (8th Cir. 1941) 35

Kansas City Southern R.R. Co. v. Morley, 88 F. Supp. 300 (W.D. Ark. 1950) 27
Kendrick v. Kendrick, 16 F.2d 744 (5th Cir. 1926), *cert. denied*, 273 U.S. 758 (1927) 34
Kennametal, Inc. v. International Union, 161 F. Supp. 362 (W.D. Pa. 1958) 33
Kentucky National Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948) 34

TABLE OF AUTHORITIES Pages

Lipscomb v. Lipscomb, 265 F.2d 822 (D.C. Cir. 1959) 11

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 12, 13
Maryland v. Louisiana, ... U.S. ....., 49 U.S.L.W. 4562 (1981) 17, 18, 25
Massachusetts v. Missouri, 308 U.S. 1 (1939) 26
Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942) 19
Morelli v. Northwest Engineering Corp., 30 F.R.D. 522 (E.D. Wis. 1962) 45

Northwest Airlines, Inc. v. Transportation Workers, —U.S. —, 49 U.S.L.W. 4383 (1981) 48

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 16

Pan Am Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960) 31
People ex rel. McColgan v. Bruce, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942) 27
Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894) 21, 22, 27
Publicker Indus., Inc. v. Roman Ceramics Corp., 603 F.2d 1065 (3d Cir. 1979) 34

Query v. 206 Cases of Assorted Liquor, 49 F. Supp. 693 (W.D.S.C. 1943) 27

Ralli-Coney, Inc. v. Gates, 528 F.2d 572 (5th Cir. 1976).... 34
Reserve Min. Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975) (en banc) 43
Reynolds v. Wabash R.R. Co., 236 F.2d 387 (8th Cir. 1956) 34
Riley v. Worcester County Trust Co., 89 F.2d 59 (1st Cir. 1936), *aff'd on other grounds*, 302 U.S. 292 (1937) 27
Rippey v. Denver U.S. Nat'l Bank, 42 F.R.D. 316 (D. Colo. 1967) 35

TABLE OF AUTHORITIES — Pages

Robertson v. Ingram-Day Lumber Co., 271 F. 1023 (5th Cir. 1921) 27
Robertson v. Jordan River Lumber Co., 269 F. 606 (5th Cir. 1921) 27
Ross v. Bernhard, 396 U.S. 531 (1970) 11

Securities & Exchange Commission v. Penn Central Co., 450 F. Supp. 908 (E.D. Pa. 1978) 39
Shafer v. Children's Hosp. Soc'y, 265 F.2d 107 (D.C. Cir. 1959) 11
Shields v. Barrow, 58 U.S. (14 How.) 130 (1855) 40
Silbert v. Nu-Car Carriers, 111 F. Supp. 357 (S.D.N.Y. 1953) 38
Smallwood v. Days Transfer, Inc., 165 F.Supp. 929 (W.D. Mich. 1958) 45
Smith v. Smith, 45 Cal. 2d 235 (1955) 18
Snyder v. Pitts, 241 S.W.2d 136 (1951) 18
Stanhope v. Ford Motor Credit Co., 483 F. Supp. 278 (W.D. Ark. 1980) 33
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) 40
State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194 (1929) 27
State Water Control Bd. v. Washington Suburban Sanitary Comm'n, 61 F.R.D. 588 (D.D.C. 1974) 17, 18

Texas v. Florida, 306 U.S. 398 (1939) 3, 16, 18, 47
Texas Industries, Inc. v. Radcliff Materials, Inc., — U.S. —, 49 U.S.L.W. 4537 (1981) 48
Toro Co. v. Alsop, 565 F.2d 998 (8th Cir. 1977) 38
Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) 23
Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 28
Tumey v. Ohio, 273 U.S. 510 (1927) 12
TVA v. Hill, 437 U.S. 153 (1978) 48

TABLE OF AUTHORITIES — Pages

United States v. California, 297 U.S. 175 (1936) 19, 20, 24
United States v. Yuginovich, 256 U.S. 450 (1921) 20
United States ex rel. Chandler v. Dodge County, 110 U.S. 156 (1884) 20
United States v. Tynan, 78 U.S. (11 Wall.) 88 (1871) 20

Van Dusen v. Barrack, 376 U.S. 612 (1964) 39
Van Hoose v. Moore, 441 S.W.2d 597 (1965) 18
Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78 (4th Cir. 1973) 45

Wallace v. Knapp-Monarch Co., 234 F.2d 853 (8th Cir. 1956) 34
Ward v. Village of Monroeville, 409 U.S. 57 (1972) 12
Watwood v. Barber, 70 F.R.D. 1 (N.D. Ga. 1976) 39
Weiss v. Sunasco, Inc., 295 F. Supp. 824 (S.D.N.Y. 1969).... 38
Willingham v. Star Cutter Co., 555 F.2d 1340 (6th Cir. 1977) 43
Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888).... 16
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 3, 19, 24, 36
Wormley v. Wormley, 21 U.S. (8 Wheat.) 421 (1823) 27

Xerox Corp. v. Litton Industries, Inc., 353 F. Supp. 412 (S.D.N.Y. 1973) 39

STATUTES AND COURT RULES

A.B. 2092, Ch. 634, CAL. STATS. 1980 .....2, 5, 32
CAL. REV. & TAX. CODE § 14104 .....2, 5, 32
CAL. REV. & TAX. CODE § 14322 40
CAL. REV. & TAX. CODE § 14510 41
CAL. REV. & TAX. CODE § 14791 2
CAL. REV. & TAX. CODE §§ 14791-95 .....2, 5, 32

TABLE OF AUTHORITIES — Pages

CAL. REV. & TAX. CODE §§ 14793-95 1
CAL. REV. & TAX. CODE § 14795 2
Diplomatic Relations Act. § 8(b), Pub. L. 95-393 23
FED. R. CIV. P. 17 9
FED. R. CIV. P. 19(a) 39
FED. R. CIV. P. 19(a)(1) 41, 43
FED. R. CIV. P. 19(a)(2)(i) 9, 42
FED. R. CIV. P. 19(b) 39
FED. R. CIV. P. 22 8
FED. R. CIV. P. 24(a) 25
39 Stat. 929 21
43 Stat. 976 21
44 Stat. 416 21
49 Stat. 1096 21
62 Stat. 927 20
28 U.S.C. § 341 (1940) 19, 20
28 U.S.C. § 1251 20
28 U.S.C. § 1251(a) 1, 7, 8, 17, 21, 22, 23, 25, 46
28 U.S.C. § 1251(b) 17, 19, 21
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 4
28 U.S.C. § 1332 30
28 U.S.C. § 1332(a) 30
28 U.S.C. § 1335 ..... 2, 7, 21, 27, 33, 46
28 U.S.C. § 1335(a) 1, 30
28 U.S.C. § 1346(a)(1) 11
28 U.S.C. § 1397 ..... 10, 30
28 U.S.C. § 1404(a) 1, 2, 10, 17
28 U.S.C. § 1406(a) 39
28 U.S.C. § 2201 5
28 U.S.C. § 2361 ..... 30, 40
28 U.S.C. § 2402 11
33 U.S.C. § 466g-1(a)(1)(B) 23
33 U.S.C. § 466g-1(c) 23
TEX. TAX-GEN. ANN. art. 14.11(c)(3),(4) 41

OTHER — Pages

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 251 (2d ed. 1973) 20
J. Beale, A TREATISE ON THE CONFLICT OF LAWS § 11.2 (1935) 18
Chafee, Federal Interpleader Since the Act of 1936, 49 Yale L.J. 377 (1940) 47
H.R. REP. 1437, 74th Cong., 1st Sess. 22
MOORE'S FEDERAL PRACTICE 27, 41
Note, The Original Jurisdiction of the Supreme Court, 11 Stan. L. Rev. 665 (1959) 25, 26
RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 13, Comment a (1971) 18
Reviser's Note, 28 U.S.C. § 1251 ..... 20, 21, 23
S. REP. 558, 74th Cong., 1st Sess. 22
STATE OF TEXAS 1977 ANNUAL FINANCIAL REPORT 12
STATE OF TEXAS 1980 ANNUAL FINANCIAL REPORT 12
R. Stern & E. Gressman, SUPREME COURT PRACTICE 459 (5th ed. 1978) 36
2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1681 (4th ed. 1873) 16
U.S. Dept. of Commerce, Bureau of the Census, "Census of Population and Housing", Texas (March, 1981) 11
6 B. Witkin, SUMMARY OF CALIFORNIA LAW, Parent and Child § 4 (8th ed. 1974) 18
C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE 21, 27, 35, 38, 44
1978 U.S. Code Cong. & Admin. News 1935, 1946 23
18 Cal. Admin. Code § 13601.1 40
23 CAL. JUR. 3d Death and Gift Taxes §§ 1, 120, 121 40

OPINIONS BELOW

The Court of Appeals opinion is reported at 629 F.2d 397 (5th Cir. 1980) and is reprinted as Appendix "A" in the Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") previously filed. The order denying a petition for rehearing is noted at 634 F.2d 630 (5th Cir. 1980), and is reprinted as Pet. App. "B". The order denying Petitioners' Motion for Leave to File Petition for Rehearing Out of Time is unreported and appears as Pet. App. "C".

The opinion of the District Court is reported at 491 F. Supp. 5 (W.D. Tex. 1979) and appears as Pet. App. "D". The District Court's prior orders denying Petitioners' Motion to Add Defendants and their Motion for Change of Venue are unreported and are reprinted as Pet. App. "E" and "F", respectively. The District Court's order and judgment dismissing the action are reprinted as Pet. App. "G" and "H".

JURISDICTION

The Court of Appeals rendered its decision in this case on October 27, 1980. A timely petition for rehearing was denied on December 12, 1980, and a timely Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The principal statutes involved in this case are 28 U.S.C. § 1251(a), 28 U.S.C. § 1335(a), and 28 U.S.C. § 1404(a). 28 U.S.C. § 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

28 U.S.C. § 1335(a) provides in relevant part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

28 U.S.C. § 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

This case also involves Sections 14104, 14791, and 14793-95 of the California Revenue and Taxation Code as well as Chapter 634 of the 1980 California Statutes, which made certain changes in these statutes. The relevant provisions of these statutes are set out in Pet. App. "I".

STATEMENT OF THE CASE

This action was brought under the Federal Interpleader Act (28 U.S.C. § 1335) by Respondent William Rice Lummis, the Texas Administrator of the Estate of Howard R. Hughes, Jr. ("the Estate").[1] A.1. The principal Defendants named in the Complaint are the inheritance tax officials of California and Texas.[2] The First Amended Complaint asserts that these officials are seeking to tax the Estate on the basis of inconsistent claims that each of their respective states was Howard Hughes' domicile at death (A. 53) and requests the District Court to adjudicate the issue of domicile. A.68.

---

1. At the time the Complaint was filed, there were two Administrators of the Estate in Texas and both were named as Plaintiffs. Since that date, however, one of the two Texas Administrators has died. R. IV, 673. The remaining Administrator, Respondent William Rice Lummis, continues to serve as the sole Texas Administrator of the Estate and the sole Plaintiff.

2. Also named as Defendants are the United States, the County Treasurer of the County of Los Angeles, and the Administrators of the Estate in Nevada, California, Louisiana, and Delaware. Because it found that the Administrators had identical interests, the District Court realigned them all as Plaintiffs. Pet. App. 3d. Plaintiff did not appeal from this determination nor did the Court of Appeals question this aspect of the District Court's decision.

The County Treasurer of Los Angeles was named as a Defendant because, at the time the complaint was filed, California law provided that he would receive a tiny percentage of the Estate if Hughes were determined to have been a California domiciliary. CAL. REV. & TAX. CODE §§ 14104, 14795. These statutes were later amended to remove the County Treasurer from California's inheritance tax procedure. CAL. STATS. 1980, Ch. 634, §§ 15.2, 28-32; *see* Pet. App. 19i, 36i. Because of this revision, the County Treasurer will no longer receive any funds from the Estate, even if Hughes is adjudged to have been a California domiciliary.

Before the present action was brought, California sued Texas in this Court, invoking the Court's original jurisdiction in reliance upon *Texas v. Florida*, 306 U.S. 398 (1939). In June, 1978, California's Motion for Leave To File Complaint was denied. *California v. Texas*, 437 U.S. 601 (1978). The Court gave no reason for denying the motion, but four Justices suggested in concurring opinions that resort to the original jurisdiction was unnecessary inasmuch as a determination of Hughes' domicile might be obtained in a federal district court pursuant to the Federal Interpleader Act.[3]

Three weeks after the decision in *California v. Texas*, the Estate filed the present action in the United States District Court for the Western District of Texas. A.1. Soon after the complaint was filed, the District Court entered a temporary restraining order prohibiting the California and Texas taxing officials from pursuing domicile-based inheritance tax claims in the courts of their own states or in any other forum. R.II, 26. This injunction was later continued by the Fifth Circuit. Order Granting Plaintiff's Motion for Injunction Pending Appeal, August 27, 1979.

Petitioners made two related motions in the fall of 1978. First, they asked the District Court to enter an order adding as defendants some twenty-two persons whom Respondent Lummis himself had recognized as the heirs of Howard Hughes. A. 21-22. Second, they moved for an order transferring the action to a neutral forum —the District of Colorado—which all parties concede was *not* the domicile of Hughes. A. 22-23. Petitioners urged that this case should not be heard in a forum whose jurors would have—through their residency and their interest in the treasury of their state's government—a personal interest in the outcome.[4] Both of these

---

3. Although the Court had previously ruled in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) that such an action was barred by the Eleventh Amendment, the concurring Justices in *California v. Texas* suggested that this holding had been undercut by *Edelman v. Jordan*, 415 U.S. 651 (1974). *See California v. Texas*, 437 U.S. at 601 (Brennan, J., concurring), at 608 n. 10 (Stewart, J., concurring), and at 615 (Powell, J., concurring).

4. California also moved in the alternative for transfer to California on the ground that it would be a more convenient forum for the witnesses. But this alternative motion was clearly framed as the least preferable of the two possible venue transfers; it was premised on the hypothesis that the District Court had *rejected* California's submission that the case should

(*continued*)

motions were denied by the District Court in November, 1978. Pet. App. "E" and "F".[5]

Following these decisions, Petitioners filed a Motion to Dismiss (A. 70-72), which was heard in tandem with a motion to dismiss previously filed by the Texas taxing officials. A. 14-20. In July, 1979, the District Court issued an order granting the motions, finding that subject-matter jurisdiction under the Federal Interpleader Act had not been established. Pet. App. "D". The court concluded that although the First Amended Complaint named some ten defendants, there was only one defendant—the County Treasurer of Los Angeles—who was both a "claimant" to property in Plaintiff's custody or possession and a "citizen of a state" for diversity purposes.[6] *Id.* at 3d-5d. The court thus held that the jurisdictional prerequisites established by Section 1335 had not been met. Respondent Lummis appealed from this order

---

(*footnote continued*)
be heard in a neutral forum. Petitioners' reply brief in the district court thus stated:

> "The Estate[ ] . . . also contends that the disadvantages which California claims disqualify Texas from being an appropriate forum for this action also apply to California. . . . The point is too clever by half. If this Court's ruling is that the case should be heard in a disinterested forum, as we have argued in Part I, *supra*, then we would agree with the Estate: Texas is no less entitled to a neutral forum than California. That is the very reason that California's motion sought, in the first instance, a transfer to Colorado. But Texas is no *more* entitled to a neutral forum than any other party. If this Court *rejects* California's thesis that a disinterested forum is preferable and required in the circumstances of this case, then the motion should be decided on the remaining grounds of convenience to witnesses and parties." R. II, 236-37.

5. These orders were later withdrawn and reissued by the District Court, with the revised orders adding a certification under 28 U.S.C. § 1292(b). The Court of Appeals later held that this certification was unnecessary since these orders were merged into the District Court's final order of dismissal; as a result, the appellate court eventually reviewed the merits of these rulings. The orders reprinted in Appendices E and F are the revised orders.

6. Although Petitioners and the Texas taxing officials are also interpleader "claimants", the District Court held that they were not "citizens of a state" for purposes of diversity jurisdiction. Pet. App. 4d; *see* p. 27, *infra*. As to the remaining defendants (*see* note 3, *supra*), the court found that the United States was similiarly not a "citizen of a state" for diversity purposes and held that the Defendant Administrators were not "claimants" to money or property of the Estate. *Id.* at 2d-3d.

and Petitioners cross-appealed, contending that the District Court's denial of their motions to add parties and change venue was erroneous.[7]

On appeal, the Fifth Circuit reversed the District Court's finding of lack of interpleader jurisdiction, but affirmed its orders denying Petitioners' motions. Pet. App. "A". The court held that Respondent Lummis, as Texas Administrator of the Estate, is a "claimant" under the Interpleader Act, and that "the citizenship of an interested stakeholder [*i.e.* Lummis] may be considered for purposes of establishing diversity under section 1335." *Id.* 11a Since Respondent Lummis' citizenship was diverse to that of the County Treasurer of Los Angeles, the court held that interpleader jurisdiction was established. *Id.* On the issues presented by California's cross-appeal, the court held that joinder of the prospective heirs was unnecessary (*id.* 12a) and that the District Court did not "abuse its discretion in denying the transfer of venue motion." *Id.* at 4a n.5. A timely Petition for Rehearing was denied on December 12, 1980. Pet. App. "B".

On January 16, 1981, Petitioners filed a second Petition for Rehearing, together with a motion for leave to file that petition out of time. This petition was based on a recently enacted California statute which, as part of a general overhaul of the state's inheritance tax law, eliminated the interest of the County Treasurer of Los Angeles in the Hughes Estate.[8] Petitioners urged that this change in California law warranted dismissal of the action. Since the Court of Appeals had determined that the County Treasurer was one of the two adverse and diverse claimants required for interpleader jurisdiction, Petitioners contended that the District Court's jurisdiction had been eliminated because the

---

7. Because the District Court concluded that it lacked subject matter jurisdiction of the case, it did not reach the United States' contention that the interpleader action against it was barred by 28 U.S.C. § 2201. Because the District Court did not determine this issue, the Court of Appeals remanded it to that court for decision. Pet. App. 13a n.14.

8. The statute (AB 2092; 1980 Cal. Stats., Ch. 634), which became effective on January 1, 1981, repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment of inheritance taxes in the first instance to the County Treasurer and retention by him of a "commission" to cover expenses of collection) and amended Section 14104 of the California Revenue and Taxation Code to require payment of the tax to the State Controller. AB 2092, §§ 15.2, 28-32; *see* Pet. App. 19i, 36i. These provisions "apply to all estates, effective January 1, 1981." *Id.* § 46; *see* Pet. App. 38i.

County Treasurer was no longer an interpleader "claimant," leaving only one such claimant who was also a citizen of a state (Respondent Lummis). Petitioners' motion for leave to file the out of time petition for rehearing was summarily denied on January 23, 1981. Pet. App. "C".

SUMMARY OF ARGUMENT

This case presents for review the decision of the Fifth Circuit that a federal district court sitting in Austin, Texas, has jurisdiction over and is the appropriate forum to resolve a controversy between the taxing officials of California and Texas and the Hughes Estate over Howard Hughes' domicile for death tax purposes. Unless reversed by this Court, the decision of the Fifth Circuit will compel Petitioners to try this controversy in a federal district court sitting in Texas, and thereby to submit California's claim that Hughes was a California domiciliary at death to jurors who are residents of a state—Texas—with a rival, inconsistent claim.

Petitioners submit that this would be unseemly and unfair. A jury of Texas citizens is an inappropriate forum to resolve the competing tax claims of California and Texas against the Estate, for several reasons. *First,* due to the enormous (and well-publicized) size of the Estate, each Texas juror would surely know that a finding of Texas domicile would provide substantial additional revenue to the State of Texas, resulting either in reduced taxes or increased public services and benefits. Each Texas juror would thus have a personal stake in the outcome of this controversy, as would his family, friends, and all other citizens of the State of Texas. A trial by jury in Texas federal court fails to afford Petitioners the neutral fact-finder required by the Due Process Clause.

Second, trial of this action in Texas runs the risk that the subjective feelings of Texas jurors about their home state could distort their objectivity concerning the intent of Howard Hughes to make his home elsewhere. Determining domicile in a death tax case inevitably involves a subjective judgment as to the decedent's intent, a judgment which should not be made by a jury which might be influenced by local and/or regional pride.

Third, a Texas forum for this action is inappropriate because of the publicity engendered by the prior state court domicile trial between Texas and the Estate. Because of that publicity, it will

be difficult, if not impossible, to find jurors in Austin who will not know that a prior jury of their peers found Howard Hughes to be a Texas domiciliary.

Fourth, trial of this action in Texas would offend the appearance of justice, as well as its actuality. It would ask too much of California's citizens to believe that a verdict by Texas jurors finding a Texas domicile and rejecting California's rival tax claim was the result of careful deliberation rather than the factors listed above.

Fifth, and finally, trying this controversy between California and Texas in the latter state is an affront to federalism. The purpose behind the grant of original and exclusive jurisdiction to this Court to resolve controversies between states was to ensure that the resolution of multi-state conflicts would occur in a forum of equal dignity with the character of the litigants. No state has ever been forced to litigate a controversy with another state before jurors who were citizens of the latter state. That precedent should not be set now.

In rejecting these considerations, and holding that California's tax claim must be litigated before a jury of Texas citizens, the Court of Appeals committed four principal errors. *First,* as we show in Part I, *infra,* its holding that the District Court has jurisdiction of this action under the Federal Interpleader Act (28 U.S.C. §1335) is at odds with 28 U.S.C. §1251(a), which gives this Court "original and exclusive jurisdiction of all controversies between two or more States." This action presents a controversy between states because the claims of California and Texas against the Estate are mutually inconsistent and, once interpleader has been invoked, both cannot prevail. California and Texas are presently adverse not only to the Estate, but also to each other.

Nor, as Texas contends, does the Federal Interpleader Act create an implied exception to the Court's exclusive jurisdiction under Section 1251(a). Nothing in the legislative history of the Act demonstrates a Congressional intent to create an exception to the Court's original jurisdiction over controversies between states. Indeed, after the Interpleader Act was enacted, the Judicial Code was revised specifically to make the exclusive character of the Court's original jurisdiction over controversies between states explicit. And the most recent amendment of Section 1251(a) underscores the Congressional desire that the Court's jurisdiction over controversies between states remain exclusive.

Second, even if district court jurisdiction of this case were not precluded by Section 1251(a), the action could not be maintained under the Interpleader Act. *See* Part II, *infra.* The Act requires that the parties to the action include at least two claimants to property in plaintiff's custody or possession, who have diverse citizenship as defined in the diversity statute. This prerequisite has not been met.

The Court of Appeals upheld interpleader jurisdiction because it found both the Texas Administrator of the Estate and the County Treasurer of the County of Los Angeles to be adverse, diverse claimants. The Texas Administrator of the Estate is the interpleader stakeholder (i.e., the party which brought the interpleader action and which controls or possesses the fund at issue), and the citizenship of a stakeholder should not be considered in determining whether the jurisdictional prerequisites of the Interpleader Act have been met. *See* Part II(A), *infra.* The Court of Appeals' holding to the contrary would radically expand statutory interpleader jurisdiction, so that statutory interpleader would completely swallow "rule interpleader" under Rule 22 of the Federal Rules of Civil Procedure and destroy its jurisdictional minimum of $10,000.

Similarly, the Court of Appeals' conclusion that Petitioner Alvord is an interpleader "claimant" is no longer correct. *See* Part II(B), *infra.* On January 1, 1981, a general revision in California's inheritance tax procedure eliminated the role of the County Treasurer in collecting inheritance taxes; thus, Alvord will no longer receive a penny from the Hughes Estate even if Hughes is ultimately determined to have been a California domiciliary. Hence he is no longer an interpleader "claimant" and his presence cannot support jurisdiction.

Third, this action is barred by the Eleventh Amendment. *See* Part III, *infra.* This case presents no substantial allegation that California's effort to tax the Estate is unconstitutional or illegal. Hence this suit is one against the State itself and cannot be maintained consistently with that Amendment.

Parts I, II, and III demonstrate that the Court of Appeals erred when it upheld interpleader jurisdiction over this action. But if the Court finds otherwise, it must then determine whether trial of this action under the Interpleader Act should occur in Texas or in a forum whose residents and jurors are not citizens of a state with a domicile claim of its own.

The District Court declined to transfer this action not because it rejected California's "neutral forum" principle, but because no interpleader "claimant" presently a party to this action resides in such a state. Such a transfer would have been possible, however, if Petitioners' Motion to Add Defendants had been granted. That motion, filed simultaneously with Petitioners' Motion for Change of Venue, sought to add as parties to this action the acknowledged heirs of Howard Hughes, one of whom resides in the District of Colorado. The Court of Appeals precluded transfer to a neutral forum because it held that the heirs did not have to be joined.

This ruling, too, was in error. *See* Part IV(A), *infra*. The heirs must be joined because, under California law, they will be personally liable for the payment of any inheritance taxes due. Even if, as the Estate contends, the heirs are in privity with the administrators, their joinder is required by Fed. R. Civ. P. 19(a)(2)(i), since they would be persons with an interest in the action whose "absence may . . . as a practical matter impair or impede [their] ability to protect [their] interest . . . ." And, contrary to the holding of the Court of Appeals, Rule 17 of the Federal Rules of Civil Procedure does not supersede the general joinder requirements of Rule 19; since the heirs will be personally liable for the tax if California domicile is found, their joinder is required.

The joinder of the heirs would permit this action to be transferred to the neutral forum sought by Petitioners. This transfer will avoid the dangers described above and ensure that if California is compelled to try its case against Texas and the Estate in a federal district court, both the actuality of justice and its appearance will be achieved.

ARGUMENT

INTRODUCTION

In this case, the Court is called upon to decide whether Howard Hughes' domicile shall be determined in a statutory interpleader action in a United States District Court sitting in Austin, Texas, to which the Estate and the taxing officials of California and Texas are parties. An alternative course of proceeding is proposed in California's companion Motion for Leave to File Complaint in *California v. Texas*, No. 88, Orig., which urges this Court to accept original jurisdiction over the controversy. A third possibility is that the tax claim of each state may be determined in

separate state court proceedings, albeit with the risk of inconsistent adjudications of domicile. Serious and complex issues of jurisdiction and federal procedure are presented.

But looming over these questions, and informing their resolution, are fundamental considerations of policy and fairness. From the Estate's point of view, of course, the overriding consideration is the risk of inconsistent state court determinations of domicile leading to the imposition of taxes exceeding the available assets of the Estate. California agrees that the federal system should provide a remedy which could sensibly avoid that result. *See California v. Texas*, 437 U.S. 601, 616 (1978) (Powell, J., concurring).

But from the point of view of the rival claimant states, another consideration—equally fundamental and compelling—is presented: the fairness and suitability of the procedure to be employed in resolving these inconsistent tax claims. The solution proposed by the Fifth Circuit in this case—a statutory interpleader action—means that the rival tax claims of two states will be decided by jurors who are citizens of one of those states.

28 U.S.C. § 1397 provides that an interpleader action may be brought in any judicial district where one or more of the claimants reside. Ordinarily, *all* of the potential claimants will reside in one or the other of the states which claim domicile.[9] In such cases, venue will only be proper in one or the other of the claimant states, and a disinterested forum will be impossible. Moreover, because the stakeholder—the estate—initiates the suit, it will be able to lay venue in the state with the lowest death tax rate. That is precisely what occurred in this case.[10] Transfer under 28 U.S.C. § 1404(a) is limited to alternative venues in which the action

9. The "claimants" will ordinarily be the states seeking to collect a domicile-based death tax and, possibly, the estate's executors or administrators for those states.

10. Because the Texas inheritance tax rate is only 16% (the amount of the federal tax credit), it will make no difference to the Estate whether Texas or Nevada is determined to be Hughes' domicile. However, the Estate has a substantial interest in defeating the claim of California, since its 24% tax exceeds the federal credit and hence would not be paid by the Hughes heirs exclusively from dollars which would otherwise go to the federal government.

might have been brought in the first instance.[11] The result is that, under the decision of the Court of Appeals, California will be compelled to submit its tax claim for judgment by jurors who are citizens of the State of Texas.[12]

This Court is not required to blind itself to the blatant unfairness, and unseemliness, of this procedure. In this highly publicized case, involving the life of a legendary figure of contemporary American history and tax claims totalling hundreds of millions of dollars, can it be possible that our federal system requires California to submit its tax claim to a jury of Texas citizens whose interest in the outcome is patent?

Although the precise amount of the taxable estate has not yet been determined, all concede that it is enormous. Using the $468 million value found by the Internal Revenue Service,[13] a finding of Texas domicile would generate taxes and interest of $85.7 million. *See* Plaintiff's Reply Brief in Support of Motion for Leave to File Complaint in *California v. Texas*, No. 88, Orig., at 6-7 and A-1; *see also* A. 123. With approximately 14,228,300 residents of Texas (*see* U.S. Dept. of Commerce, Bureau of the Census, "Census of Population and Housing", Texas (March, 1981)), the financial interest of each juror on a *pro rata* basis would be $6.02. Each Texas juror would surely know that a finding of domicile would mean substantial additional revenue to the State of Texas, resulting either in reduced taxes or increased services

---

11. By limiting the parties to citizens of the competing states, the Estate sought to foreclose transfer to a disinterested forum. This strategy may well succeed unless the joinder of additional parties residing in other states is ordered. *See* pp. 39-45, *infra*.

12. Undoubtedly, Texas will demand a trial by jury, as it did in the prior state court domicile trial. That demand may well be justified. *See Ross v. Bernhard*, 396 U.S. 531, 541 n. 15 (1970) (jury trial right may be applicable to legal issues presented in interpleader action despite equitable nature of remedy); *Lipscomb v. Lipscomb*, 265 F.2d 822 (D.C. Cir. 1959); *Shafer v. Children's Hosp. Soc'y*, 265 F.2d 107 (D.C. Cir. 1959) (jury trial required to decide issue of decedent's domicile). *Cf.* 28 U.S.C. §§ 1346(a)(1), 2402 (jury trial right available in action contesting federal taxes).

13. The California Inheritance Tax Referee preliminarily determined the value to be approximately $1.1 billion, considerably greater than the IRS figure. R. I, 107. Texas has said that its preliminary analysis is somewhere in between, but "closer" to the IRS figure than the California one. Texas' Brief in Opposition in *California v. Texas*, No. 88, Orig., at 10.

and benefits.[14] A tax of this magnitude would itself exceed the total inheritance tax revenues for the 1980 fiscal year, which amounted to $75.6 million.[15] It would also have constituted nearly 1.2% of the *total* tax receipts of the State of Texas in that year.[16]

The jurors' personal stake in the controversy—shared by each of their fellow citizens—makes a trial by jury in Texas federal court inconsistent with the disinterested trier of fact required by the Due Process Clause.[17] *Tumey v. Ohio*, 273 U.S. 510 (1927) (village mayor who received $12 in costs if defendant convicted has disqualifying self-interest); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (invalidating conviction by mayor's court where mayor, in addition to judicial functions, possessed executive responsibility for village finances which were affected by fines levied in his court); *Connally v. Georgia*, 429 U.S. 245 (1977) ($5 fee for issuing search warrant disqualifies magistrate).[18]

---

14. Revenues from the Texas inheritance tax are maintained in the State's "General Revenue Fund" which is "the major state operating fund from which most agencies are financed." *State of Texas 1977 Annual Financial Report* 18-19, R. I, 99 and Exhibit E-3.

15. *See State of Texas 1980 Annual Financial Report* 3. The record contains the 1977 Report (*see* note 14, *supra*), in which year the comparable figure was $66.6 million. *See* R. I, 99 and Exhibit E-1.

16. The total tax collections of the State of Texas were $6,343,-800,000. 1980 Report at 3. The 1977 figure is approximately $4.4 billion. *See* R. I, 99 and Exhibit E-1.

17. In the ordinary tax case, there are only two sides: the state and the taxpayer. Jurors are both citizens and taxpayers. While they have an interest in maximizing their state's revenue (and the courts have recognized that appeals to the pecuniary interests of juries in tax cases are improper (*see, e.g., Epperson v. United States*, 490 F.2d 98 (7th Cir. 1973)), jurors may also have sympathy as taxpayers for the individual or corporation against whom the tax is being asserted. Hence jurors bring to the ordinary tax case no preconceptions which might tip the scales of justice. But because this case is at bottom an *interstate* controversy, there are three relevant parties, not two: Texas, California and the Estate. A Texas juror might, as a Texan, be sympathetic with the State of Texas and, as a taxpayer, have a countervailing identification with the Estate. But he would be unlikely to feel empathy for California's tax claim.

18. This line of cases is underscored by the Court's recent decision in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). There the Court confronted an attack on the enforcement of the Fair Labor Standards Act by the Employment Standards Administration (ESA) of the Department of Labor, based on the fact that the ESA received civil penalties assessed

(*continued*)

Trial of this action in Texas would also run the risk that the parochial effects of local and regional pride could have an effect upon the jury. Howard Hughes was a distinguished American who pioneered in aviation, film production and business and—financial benefits aside—any state would be proud to claim him as its own. The determination of domicile in a death tax case inevitably involves conflicting interpretations as to the decedent's mental intent—that is, which state the decedent considered to be his "home". In this case, to be specific, Texas claims that Hughes' domicile of origin was never superseded and that, despite his *de minimis* physical presence within the state of Texas after 1926, Hughes never abandoned his intention that Texas remain his permanent home. If the case were tried in Texas, this inherently subjective determination would be open to the risk that, despite instructions to the contrary, jurors would use their personal feelings about their home state of Texas as a guide to divining the intention of the decedent. Moreover, the pride and affection which each Texas juror justifiably has for the State of Texas would make the jury uncommonly receptive to emotionally charged appeals and evidence, such as Mr. Hughes' past statements about Texas, which either a Special Master appointed by this Court or jurors drawn from other states could view dispassionately. Arguments and evidence calculated to tap the roots of regional chauvinism—which, if the prior Hughes domicile trial in the Texas

---

(*footnote continued*)
under the Act as reimbursement for the costs of determining violations and assessing penalties. Noting that the "requirement of neutrality has been jealously guarded" (*id.* at 242), the Court nonetheless rejected the due process challenge, holding that "the strict standards of *Tumey* and *Ward*" were not applicable to the ESA, which acted as a prosecutor rather than a judge in Fair Labor Standards cases. *Id.* at 243. (The actual determination of such cases was performed by the Office of Administrative Law Judges, which received no funds whatever under the statutory scheme.) But the clear intimation of the opinion is that if *Tumey* and *Ward had* been applicable, the fact that the decision maker's agency would financially benefit from a favorable decision would have violated the Due Process Clause. It follows that the same prohibition would prevent a juror from adjudicating a case the result of which would be to cause a substantial benefit to accrue to the juror's home state unless, of course, no alternative forum were available.

probate court is any guide,[19] are to be expected—are a significant threat to fair adjudication in a death tax domicile dispute tried to jurors who are citizens of one of the contending states.

The danger that the decision in this action, if tried in Texas, might be influenced by considerations of self-interest or regional pride would be exacerbated by the substantial prior publicity

---

19. For example, counsel for Texas made the following statement in his closing argument to the jury in the previous state court trial:

> "I think this is as good a time as any to explain that our chief witness in this case has been Howard Hughes, and we have tried to bring you what Mr. Hughes said, and I think that you all realize that there are times in a man's life or person's life . . . where you say things with more seriousness than you do at other times, and I believe we can point out to you that when there was a really serious event, that Mr. Hughes became a Texan and was a Texan and said he was a Texan for the world to hear.
>
> "And the first such event that I will speak to, now, is this 1938 reception. He is back *here*, at his boyhood home. He is at the Rice Hotel, and I read to you from the paper what he said, . . . the paper said, 'Bashful as a school boy and just as captivating, Mr. Hughes dug down in his pocket and brought out a wad of notes from which he spoke. 'If you don't believe I wrote this, myself, just try to read the handwriting,' he said. 'Coming from Texas, particularly if it's a person flying around the world,' Mr. Hughes said, 'there is nothing you can see anywhere that you can't see in Texas. After you have flown across Texas, two or three times the distance around the world doesn't seem so great. We didn't see any mountains on our trip that were any steeper than the mountains in West Texas. We didn't see any plains that were any broader than the plains of Central Texas, and we didn't see any swamps that were any wetter than the swamps of Southeast Texas.'
>
> "Now that is what Mr. Hughes said about his state, and he said it *here* and he said it to people who were *here* welcoming him home; and I want you to pay close attention as we bring you, today, a recap of all the statements that Mr. Hughes ever made about Texas, *because you are going to be asked to believe by the Administrators that he declared himself an ex-Texan, that he didn't like Texas, that he left it in 1925 and never thought about it again. And I want you to listen closely and think about all the statements that Mr. Hughes made about Texas, and I want you to think as to whether or not you could refer to your state in the way that he referred to Texas in 1938, here in Houston, if it didn't mean something just a little special to him.* And you are going to be asked to believe that this Texas domicile is a fixation that exists only *here in Texas.*" (Reporter's Transcript, February 15, 1978, at 22-24 (emphasis added)).

We do not suggest that any aspect of this argument was improper. But it is self-evident that references to the jurors' *own feelings* about their home state of Texas are inherently likely to have a special impact upon a Texas jury.

accorded to the prior state court domicile trial between Texas and the Estate. As with everything Howard Hughes touched, the Hughes probate proceedings have engendered an enormous amount of publicity, much of it generated by the prior domicile trial in the Texas state courts. The record reveals that the Austin press has devoted extensive coverage to the tangle of legal proceedings which have developed since Howard Hughes' death with, of course, particular emphasis on the domicile trial. *See* R. I, 105 and attached Exhibits. Should this action be tried to a jury in Austin, it will be exceedingly difficult, if not impossible, to find jurors who have not heard about—and been influenced by—the prior state court proceedings relating to Howard Hughes.[20]

For these reasons, each potential juror—no matter how well intentioned and how carefully instructed by the District Court—would face a host of obstacles in attempting to arrive at an impartial verdict. Because of the enormous size of the Estate, he or she would know that a verdict finding a Texas domicile could result in a personal tax saving and a like tax saving for every fellow Texan, a measurable and costless increase in public services, or a combination of both. As a Texan, the juror might be drawn by deep-seated feelings about Texas in ways which would benefit one side of the case to the detriment of the other; a Texas juror would be receptive, as a citizen of another state would not, to appeals to regional chauvinism. *See, e.g.,* note 19, *supra.* Each juror would also be acutely aware that a previous Texas jury had found Hughes to be a Texas domiciliary. While each of these factors might be influential in its own right, together they significantly jeopardize the possibility of a fair trial.

Moreover, trial of this action in a forum with a domicile claim of its own would raise serious questions not only of the actuality

---

20. Of course, coverage of the Texas state court proceedings was not confined to the Texas press. But the record reveals that it was vastly more extensive. For example, the Austin paper had five times the number of such stories than the Denver *Rocky Mountain News*. *See* R.II, 244 and Exhibits B-1 and D-1.

But more fundamentally, the impact that any given quantum of coverage has on the average reader, or potential juror, surely depends to a large extent on the individual's own interest in the subject and, hence, on his or her residence. It cannot be doubted that press coverage of the prior verdict by a *Texas* jury finding a *Texas* domicile for Mr. Hughes has a greater impact in Austin than in Denver.

of impartial justice but also of the appearance of it. A federal interpleader trial will surely generate as much or more publicity as the prior Hughes probate litigation. Should this action be tried in Austin and a finding of Texas domicile result, the suspicion will inevitably be created—despite the most diligent efforts of the District Court to assure a fair trial—that the verdict was the result of the economic, emotional and personal considerations discussed above, rather than a product of careful deliberation on the evidence presented. Certainly the citizens of California would not perceive that justice had been done.

Finally, it would be difficult to imagine a greater affront to federalism than a trial of the California and Texas tax claims before a jury of Texas citizens. Throughout our history it has been regarded as inappropriate to compel a state to resort to the tribunals of another state for redress. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) (cataloguing reasons behind grant of original jurisdiction for suits betwen states and citizens of other states); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 288 (1888) (same); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475-76 (1793) (same); 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1681 (4th ed. 1873) (reasons for exclusive jurisdiction of Supreme Court over interstate controversies). Here, the controversy in not simply between a state and citizens of another state, but one which involves the rival claims of two states. Adjudication of such a case by a jury drawn from the citizens of *one* of those states is unprecedented and fundamentally unfair.

A trial such as is proposed, in which the rival tax claims of two states will be adjudicated, has never before been held in a United States District Court. The unfairness, and overall unseemliness, of the process to which California would be subjected, is avoidable. As we shall now demonstrate, there are two possible solutions to this controversy which avoid the fundamental unfairness of requiring one state to litigate its tax claims before jurors of the rival state while still affording a "single, binding adjudication of domicile." *California v. Texas*, 437 U.S. 601, 610 (1978) (Stewart, J., concurring). In our view, the only available federal forum is an original proceeding in this Court under the authority of *Texas v. Florida, supra. See* Part I, *infra;* Motion for Leave to File Complaint, *California v. Texas*, No. 88, Orig. Indeed,

for the reasons stated in Parts I, II, and III, *infra*, the Federal Interpleader Act does not and cannot provide for jurisdiction to resolve this case. But if the Court holds to the contrary and finds that a statutory interpleader action is available in this case, then the question of venue must be addressed. In Part IV, *infra*, we show that the District Court should have joined improperly omitted parties, at least one of whom resides in a non-claimant state, thereby making possible a transfer of the action to a disinterested forum under 28 U.S.C. § 1404(a).

I.

DISTRICT COURT JURISDICTION IS BARRED BY 28 U.S.C. § 1251(a) BECAUSE THIS IS A CONTROVERSY "BETWEEN TWO . . . STATES" WITHIN THIS COURT'S EXCLUSIVE JURISDICTION

If the decision of the Court of Appeals in this case were to stand, then for the first time in our nation's history two states would litigate rival tax claims to the same fund in a United States District Court. Indeed, to our knowledge, that would also be the first occasion in which a district court adjudicated *any* controversy between two states.

The reason, of course, is 28 U.S.C. § 1251(a), which gives this Court "original *and exclusive* jurisdiction of *all controversies between two or more States.*" (Emphasis added). While this Court has only concurrent jurisdiction over other kinds of controversies within the original jurisdiction under Article III, Section 2, Clause 2 (*see* 28 U.S.C. § 1251(b)), controversies between states may only be heard here.[21]

This case involves precisely such a controversy. California and Texas each seek to impose a tax based upon the alleged domicile of the decedent. Each state adheres to the common-law definition

---

21. The statutory grant of exclusive jurisdiction to the Court over "*all* controversies betwen two or more States" (emphasis added) so obviously precludes other courts from adjudicating such disputes that it is not surprising to find little authority in this Court supporting the proposition that the statute means what it says. However, the Court recently observed in a suit brought against Louisiana by several states and the United States that although the United States could sue Louisiana in a district court under Section 1251(b), such a suit "necessarily would not include the plaintiff States . . . ." *Maryland v. Louisiana*, — U.S. —, 49 U.S.L.W. 4562, 4567 (1981). When attempts have been made to file cases within the Court's original and exclusive jurisdiction in the lower courts, more-

(*continued*)

of domicile.[22] Each state's law embraces the concept that an individual has but one domicile at any time.[23] The very purpose of the statutory interpleader action brought by the Estate is to eliminate the possibility of inconsistent, multiple taxation by *both* California and Texas. *See California v. Texas, supra,* 437 U.S. at 608 n.9 (Stewart, J., concurring). This necessarily means that if one state wins, the other must lose. The filing of this interpleader action has therefore locked California and Texas into an adversary position, and has created a "controvers[y] between two or more States" of the most concrete kind.

(*footnote continued*)
over, they have been unequivocally rejected. *State Water Control Bd. v. Washington Suburban Sanitary Comm'n,* 61 F.R.D. 588 (D.D.C. 1974); *Friedberg v. Santa Cruz,* 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *DeMiglio v. Paez,* 189 N.Y.S.2d 593, 18 Misc. 2d 914 (1959).

Arizona v. New Mexico, 425 U.S. 794 (1976), is not to the contrary. There the Court denied Arizona leave to file a bill of complaint seeking to invalidate a tax imposed by New Mexico on the New Mexico generating facilities of three Arizona utilities. The suit was brought by the state in its proprietary capacity and as parens patriae. The Court held that resort to the original jurisdiction was unnecessary, because the issues which Arizona sought to tender to the Court were being litigated in the New Mexico state courts by the affected utilities. The Court also was "not unmindful that the legal incidence of the electrical energy tax [was] upon the utilities" (*id.* at 797-98), not the state itself. A real interstate controversy thus probably was not present.

The present case is quite different. Here there is no doubt that it is the state itself—and not a third party—which is the real party in interest. Moreover, unlike *Arizona v. New Mexico,* this case involves the states themselves in their sovereign capacity. *See Maryland v. Louisiana,* ..... U.S. ....., 49 U.S.L.W. 4562, 4573 (Rehnquist, J., dissenting). The issue of Hughes' domicile for death tax purposes therefore cannot be litigated by third parties in another forum.

22. *See Smith v. Smith,* 45 Cal. 2d 235, 243-44 (1955); *Estate of Glassford,* 114 Cal. App. 2d 181, 186 (1952); 6 B. Witkin, SUMMARY OF CALIFORNIA LAW, Parent and Child § 4 (8th ed. 1974); *Snyder v. Pitts,* 241 S.W.2d 136, 139 (1951); *Van Hoose v. Moore,* 441 S.W.2d 597, 615 (1965); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 13, Comment a (1971). *Cf. Texas v. Florida,* 306 U.S. 398, 413 (1938) (noting general uniformity of state common law regarding domicile).

23. *See Estate of Glassford,* 114 Cal. App. 2d 181, 186 (1952); *Snyder v. Pitts,* 241 S.W.2d 136, 139 (1951); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971); J. Beale, A TREATISE ON THE CONFLICT OF LAWS § 11.2 (1935).

This conclusion is not inconsistent with the Court's 1978 denial of California's motion for leave to file an original complaint against Texas. Nor is it inconsistent with Justice Stewart's statement in his concurring opinion that, as matters then stood, the real controversy was between each taxing state and the Hughes Estate, and not between California and Texas themselves. 437 U.S. at 611-12. While we disagree with that proposition (*see* Memorandum in Support of Motion for Leave to File Complaint, *California v. Texas*, No. 88, Orig., at 28-39), it is important to understand that an entirely different situation is presented here. In 1978, there were separate tax proceedings pending in each of the two states. Neither state was a party to the proceeding in the other's court. That led Justice Stewart to conclude that "it would be of no possible concern to either California or Texas that the other might adjudge Hughes a domiciliary and succeed in taxing his estate . . . ." *Id.* at 611.

That statement plainly no longer holds now that the Estate has invoked federal interpleader. As a result, California and Texas have now involuntarily been joined as opposing claimants. As their claims are mutually inconsistent, no more than one state can prevail. The filing of the statutory interpleader action has made the competing states—who previously were free to proceed without regard to the actions of the other state—litigation adversaries. For that reason, the interpleader suit involves a "controvers[y] between two . . . States" with the ambit of Section 1251(a).[24]

Nevertheless, Texas has urged that the Federal Interpleader Act creates an implied exception to the Court's exclusive jurisdiction under Section 1251(a). It relies on three cases[25] which upheld district court jurisdiction of particular suits by the *United States* against a state even though the predecessor of Section

24. The Texas Respondents, at least, have not denied that the rival claimants in this action are the states of California and Texas, rather than their respective taxing officials. Indeed, they have conceded that this action presents a controversy between states, since their motion to dismiss the action for lack of jurisdiction stated that "[t]he non-estate claimants here are in reality California and Texas." R. III, 338; *see also* A. 14-16.

25. *United States v. California*, 297 U.S. 175 (1936); *Case v. Bowles*, 327 U.S. 92 (1946); *Minnesota v. United States*, 125 F.2d 636 (8th Cir. 1942).

1251—28 U.S.C. § 341 (1940)—was understood to have given this Court exclusive jurisdiction of such suits.[26]

Those cases express a limited principle which is inapplicable to this one. They merely held that despite the general grant of exclusive jurisdiction in former Section 341 over suits between the United States and a state, "concurrent jurisdiction might on occasion be given the district courts by *special jurisdictional provisions overriding the general provision in* § 341." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 251 (2d ed. 1973) (emphasis added). For several reasons, this exception to the Court's exclusive jurisdiction under Section 1251(a) is inapplicable here.

In each of these cases, the statute providing for district court jurisdiction had been enacted *after* the original jurisdiction statute, and was found to constitute an implied exception to it.[27] In this case however, the Federal Interpleader Act was adopted in 1936, twelve years *before* the 1948 revision to the Judicial Code in which Congress made explicit its intent that the Court's jurisdiction over controversies *between states* be exclusive.[28] Prior to 1948, "Section[]

---

26. Since 1948, of course, Section 1251(b) has made the Court's original jurisdiction of suits between the United States and a state concurrent.

27. Thus, in the leading case, *United States v. California, supra,* the Court cited three cases for the proposition that Section 341's grant of exclusive original jurisdiction was superseded by the grant of jurisdiction to the district courts under the Federal Safety Appliance Act. *United States v. Yuginovich,* 256 U.S. 450 (1921); *United States ex rel. Chandler v. Dodge County,* 110 U.S. 156 (1884); and *United States v. Tynen,* 78 U.S. (11 Wall.) 88 (1871). None of these cases has anything to do with jurisdiction; rather, they all stand for the principle that "a later statute repeals former ones when clearly inconsistent with the earlier enactments." *United States v. Yuginovich,* 256 U.S. at 463, citing *United States v. Tynen, supra.* Hence, the linchpin of these cases is not a jurisdictional principle, but rather a canon of statutory construction which, as shown in text, is inapplicable to this case.

28. The 1948 revision of the Judicial Code (62 Stat. 927) replaced former 28 U.S.C. § 341 (1940) with 28 U.S.C. § 1251. Former Section 341 provided

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. . . ."

341 . . . did not confer expressly exclusive jurisdiction on the Supreme Court in civil cases between States . . . ." Reviser's Note, 28 U.S.C. § 1251. The 1948 revision was intended to eliminate any ambiguity and to delineate clearly which aspects of the Court's original jurisdiction were exclusive and which were not. *Id.* Suits between states were put within the Court's exclusive jurisdiction (§ 1251(a)), while jurisdiction over suits between a state and the United States was made concurrent. § 1251(b). In short, the Interpleader Act preceded, rather than followed, the legislation confirming the Court's exclusive jurisdiction over controversies between states. Accordingly, it cannot be said here that the *subsequent* enactment of a statute providing for district court jurisdiction of a particular class of action has modified an earlier grant of exclusive jurisdiction in this Court.

Even if the order of enactment of the Interpleader Act and the Judicial Code revision had been reversed, Texas' argument would falter. The ultimate issue is the intent of Congress, and canons of construction such as those employed in *United States v. California,* (*see* note 27, *supra*) are no more than aids to discerning legislative intent. Neither the history of the Federal Interpleader Act nor of the present Judicial Code remotely suggests any intent on the part of Congress to allow the range of disputes which are grist for the statutory interpleader mill to be adjudicated in a district court when the parties to the dispute are sovereign states.

The Federal Interpleader Act was enacted in 1936 (49 Stat. 1096), and was a substantial expansion of the prior law which essentially limited federal statutory interpleader to actions brought by insurance and casualty companies and sureties. 39 Stat. 929; 43 Stat. 976; 44 Stat. 416; *see* 7 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE (hereafter "WRIGHT"), Civil, § 1701. The 1936 Act substantially broadened the availability of interpleader and liberalized its provisions. *Id.*

The language used in the Act itself refutes any suggestion that Congress intended to create an exception to the Court's exclusive jurisdiction over controversies between states. 28 U.S.C. § 1335 requires that the defendants be "two or more adverse claimants, of diverse citizenship as defined in section 1332"—*i.e.*, "citizens of different states." But it had long been held that neither a state nor a state officer sued in his or her official capacity is a "citizen of a state." *E.g., Postal Telegraph Cable Co. v. Alabama,* 155 U.S. 482

(1894). The selection of this language—which necessarily precludes the use of statutory interpleader to resolve disputes where the claimants are states or state officials[29]—is persuasive evidence that Congress did not envision the use of statutory interpleader to resolve such controversies. Nor is there the slightest suggestion in the Act's legislative history, which includes a comprehensive report of the Senate Judiciary Committee (S. REP. 558, 74th Cong., 1st Sess; *see also* H.R. REP. 1437, 74th Cong., 1st Sess.), of any intent to create district court jurisdiction for interpleader suits in which two or more states are adverse claimants. Indeed, the language of the Senate Report suggests that controversies between states were far from contemplation of Congress.[30]

Likewise, the history of the 1948 Judicial Code revisions suggests no intent of Congress that federal interpleader be an exception to the Court's exclusive jurisdiction under Section 1251(a). The language actually used by Congress, of course, suggests no exception: "The Supreme Court shall have original and exclusive jurisdiction of *all* controversies between two or more States." (Emphasis added). Moreover, as noted above, this language was the result of a conscious effort by the revisers to eliminate an ambiguity in the prior statute. The revisers were well aware that some cases, including two of the three cited by Texas, had allowed suits brought by the United States against a state, even though the Court's jurisdiction over such suits was thought to be exclusive.

---

29. Indeed, it is only because of the atypical presence in this case of an interested stakeholder residing in Nevada *and* the County Treasurer of Los Angeles—both deemed by the Court of Appeals to be additional "claimants"—that jurisdiction under the Interpleader Act was held to exist. *See* pp. 28-29, *infra.*

30. For example, the Senate Report stated:

> "Many important *businesses* which are vexed by similar claims from *residents of different states* remain outside the scope of [the prior] legislation. . . . [T]he benefits of this remedy could be justly extended to *other businesses.*"
>
> * * * *
>
> "The Committee have had constantly in mind the rights of the *private citizens* who are asserting claims against *the various corporations* that might file bills of interpleader, and has so drawn the bill as to protect and further the interests of these claimants." (S.REP., at 3-4 (emphasis added)).

See also H.R. REP. at 2. *None* of the examples given in the report of the kinds of problems which could be resolved under the proposed legislation involve conflicting claims of state governmental bodies.

See Reviser's Note to 28 U.S.C. §1251, *supra*. Against that background, they proposed, and Congress enacted, a new Section 1251 which made the jurisdiction over "all" suits *between states* exclusive while the jurisdiction over suits *between the United States and a state* was made concurrent. Thus Congress at once codified the cases on which Texas now relies as to suits between a state and the United States but at the same time stated unambiguously that *"all"* suits between states be within the exclusive jurisdiction of this Court.

The latest revision of Section 1251(a) underscores the importance which Congress has attached to the Court's exclusive jurisdiction over controversies between states. In 1978, because Congress felt that the Court "should not be burdened with such litigation on its original docket" (1978 U.S. Code Cong. & Admin. News 1935, 1946), Section 1251 was amended to make the Court's original jurisdiction over actions and proceedings against ambassadors and public ministers of foreign states concurrent rather than exclusive. Diplomatic Relations Act, § 8(b), Pub. L. 95-393, 92 Stat. 810 (1978). Yet Congress did not disturb the grant of exclusive original jurisdiction over controversies between states. Thus, Congress' latest word on the subject was to confirm that the Court's jurisdiction over controversies between states—but no others—remains exclusive.[31]

Of course, it should come as no surprise that Congress gave no thought to the use of federal statutory interpleader as a means of resolving death tax or other disputes between states or to the crea-

---

31. Congress knows how to create exceptions to the Court's original and exclusive jurisdiction over controversies between states when it chooses to, but it has chosen to do so only once. 33 U.S.C. § 466g-1(c) (providing for district court jurisdiction over suits between states which have signed compacts relating to pollution of an interstate river system). And on the one occasion in which Congress has exercised this power, it has made *consent* of the state a precondition to its being sued in federal district court. 33 U.S.C. § 466g-1(a)(1)(B). The fact that Congress has only created district court jurisdiction over controversies between states once and, when it did, made that jurisdiction dependent on the defendant state's prior consent strongly cautions against inferring an intent on the part of Congress to create district court jurisdiction over unsuspecting and nonconsenting states through the Interpleader Act. It should not be lightly inferred that Congress has done impliedly what it has never done explicitly. *Cf. Touche Ross & Co. v. Reddington*, 442 U.S. 560, 571 (1979).

tion of an exception to this Court's exclusive jurisdiction over controversies between states for actions brought under the Interpleader Act. Until recently, the prevailing understanding of the Eleventh Amendment was that it imposed a constitutional barrier to such suits, so that any attempt to create jurisdiction in a district court would have been futile. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).[32]

The cases on which Texas relies are quite different on another level, as well. In those cases, Congress' intent to establish district court jurisdiction for suits by the United States against a state could fairly be implied from the circumstances, for the jurisdictional provisions were an integral part of a precise federal regulatory scheme in which enforcement proceedings were to be brought in a district court.[33] By contrast, the Interpleader Act is a procedural vehicle for the resolution of a wide range of disputes. *See* 7 WRIGHT, *supra*, Civil § 1702. Moreover, in *United States v. California, supra*, the Court stressed that enforcement actions of the kind involved there were local controversies, requiring the presence of local witnesses (297 U.S. at 188), a factor plainly inapplicable to domicile disputes such as this one. Congress had no reason to view multi-state death tax disputes over domicile as local controversies requiring resolution in a local court. Indeed, in light of the blatant unfairness of trying the rival state tax claims in a federal

32. The principles articulated in *Worcester County* were surely understood by the Congress which, only a year earlier, enacted the Interpleader Act, to say nothing of the Congress which revised the Judicial Code in 1948. It was not until the last few years that those principles were opened to question. *See California v. Texas*, 437 U.S. 601, 608 n.10, 615 (1978) (concurring opinions).

33. *United States v. California*, 297 U.S. 175 (1936) was a suit to enforce provisions of the Federal Safety Appliance Act. The Court said that "[s]ince the section which . . . imposes the liability . . . also provides the remedy and designates the . . . court in which the remedy is to be pursued" (*id.* at 188), it appeared that Congress intended to allow such suits to be brought in a district court. Likewise, *Case v. Bowles*, 327 U.S. 92 (1946), was an action to enforce the Emergency Price Control Act, which by its terms applied to the states. *Id.* at 99-100. That statute gave the district court jurisdiction over all enforcement suits (*id.* at 97), and the Court held this to be an exception to the exclusive original jurisdiction over suits between the United States and a state.

court sitting in one of the two claimant states (*see* pp. 11-16, *supra*), it is inconceivable that Congress intended to authorize it.

There is, in short, no principled basis for inferring an intention on the part of Congress silently to create an exception to the Court's exclusive jurisdiction over controversies between States. Indeed, the notion of such implied exceptions to Section 1251(a) is a radical one, which would significantly change the historic understanding of the Court's original jurisdiction. Other grants of jurisdiction to the district courts might just as easily be regarded as implied exceptions to Section 1251(a). For example, if one state sought to sue another for an antitrust violation or violations of a federal statute otherwise affecting commerce (*see, e.g., California v. Texas*, No. 87, Orig.), under Texas' theory of implied exceptions, the matter could be heard in a district court. The same might be true of suits involving a federal question by one state against another. *E.g., Maryland v. Louisiana, supra* (federal statutory preemption and federal unconstitutionality of state tax); *Arizona v. California*, 373 U.S. 546 (1963). These exceptions to Section 1251(a) would devour the rule. Congress surely meant to establish a firmer principle of jurisdiction than that when it provided in Section 1251(a) that "the Supreme Court shall have original and exclusive jurisdiction of *all* controversies between two or more States." (Emphasis added).

It should be said that although a decision that the Interpleader Act is not an implied exception to the Court's exclusive jurisdiction over controversies between states may eliminate the possibility of some alternative forums for cases such as this, it would not necessarily compel the Court to accept jurisdiction of each such controversy. The question of the jurisdiction of a district court to hear a lawsuit between two states is analytically distinct from the question of whether the Court *must* exercise jurisdiction in a given case.

The latter question is somewhat delicate and sophisticated. The Court has imposed prudential limitations upon the exercise of its original jurisdiction. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794 (1976) (leave to file suit between states denied where issues would be resolved between other parties in alternative forum); *Maryland v. Louisiana*, — U.S. —, 49 U.S.L.W. 4562, 4566 (1981) quoting from *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); Note, *The Original Jurisdiction of the Supreme Court,*

11 Stan. L. Rev. 665, 694-700 (1959). The observation in *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939) that the Court would "inquire whether recourse to that jurisdiction . . . is necessary for the State's protection" implies that *some* cases within the literal boundaries of the Court's exclusive jurisdiction would nevertheless not be heard. Moreover, the requirements for the invocation of the Court's equitable jurisdiction are strictly observed. Thus Justice Stewart argued in *California v. Texas, supra*, that, as of three years ago, the controversy between California and Texas as to Hughes' domicile had not sufficiently matured to permit the invocation of this Court's original jurisdiction. 437 U.S. at 613-15. While we disagree with that analysis (*see* Memorandum in Support of Motion for Leave to File Complaint, *California v. Texas*, No. 88, Orig., at 28-39), it is enough at present to say that the issues presented here are distinct. The Court could conclude that this case presents a controversy between two or more states and thus cannot be litigated, at least by them (*see Arizona v. New Mexico, supra*), in a lower federal court, even if the Court is not prepared to regard the controversy as one worthy of its original jurisdiction.

Thus, while we do indeed urge the Court to exercise its original jurisdiction to resolve the present controversy between California and Texas (*see* Motion for Leave to File, *supra*), we recognize that this conclusion would not automatically follow from a reversal of the Court of Appeals' judgment, for that reversal might not necessarily address the equitable and prudential objections to the exercise of original jurisdiction advanced by Justice Stewart in *California v. Texas, supra*, or by Texas in opposition to California's companion motion.

In any event, whatever the ultimate disposition of California's Motion for Leave to File Complaint, the present case cannot be heard in a federal district court. The decision of the Court of Appeals is at odds with both the plain language of Section 1251(a) and the American legal tradition—now almost two centuries old—that controversies between states may only be resolved by this Court. The decision of the Court of Appeals is therefore erroneous and should be reversed.

II.

THIS ACTION DOES NOT MEET THE JURISDICTIONAL PREREQUISITES OF THE FEDERAL INTERPLEADER ACT

Even if jurisdiction in this case were not precluded by 28 U.S.C. § 1251, jurisdiction could not be had under the Federal Interpleader Act. The Act requires that the parties to the action include at least two "adverse claimants, of diverse citizenship as defined in [28 U.S.C.] section 1332" who are claiming money in Plaintiff's custody or possession. 28 U.S.C. § 1335. The identity and citizenship of the "claimants" in turn depend on the identity of the real parties in interest, since it is the citizenship of the real parties, not that of the nominal ones, which controls for diversity purposes.[34]

While the Complaint in this action named as Defendants the taxing officials of California and Texas (A. 1), it is readily apparent that the real parties in interest—and thus the true interpleader "claimants"—are the taxing states themselves, who will receive any taxes collected if they prevail or be restrained from collecting taxes if they do not. States, however, are not "citizens of a state" for diversity purposes (*Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482 (1894)) and neither are state taxing officials sued in their stead.[35] The District Court thus held that the individual state taxing officials named as defendants in this action were not "citizens of a state" who could support jurisdiction. Pet. App. 4d. This holding was not questioned by the Court of Appeals.

---

34. WRIGHT, *supra*, Civil, § 1556, p. 710 ("The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists"); 3A MOORE'S FEDERAL PRACTICE ¶ 17.04, p. 17-27. *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421 (1823).

35. *See State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929) (state commission held to be "alter ego" of state and thus not a citizen for diversity purposes). As to taxing officials specifically, *see People ex rel. McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942); *Craig v. S. Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942); *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir.), *aff'd on other grounds*, 302 U.S. 292 (1937); *Robertson v. Ingram-Day Lumber Co.*, 271 F. 1023 (5th Cir. 1921); *Robertson v. Jordan River Lumber Co.*, 269 F. 606 (5th Cir. 1921); *Kansas City Southern R.R. Co. v. Morley*, 88 F. Supp. 300 (W.D. Ark. 1950); *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D.S.C. 1943).

Because of these jurisdictional principles, interpleader jurisdiction can be successfully invoked only if the plaintiff can show the existence of two parties other than state taxing officials who are *both* adverse claimants to the fund at issue *and* citizens of different states. In a domicile dispute as is presented here, this will rarely occur, as the proper parties to such cases will normally include only the estate (represented by an executor or administrator) and the several claimant states. Thus, in the prototypical dispute of this kind—between an executor and several states—statutory interpleader jurisdiction will be unavailable.

The Court of Appeals' finding of interpleader jurisdiction in *this* case was based on a combination of unlikely factual circumstances and incorrect conclusions of law. Out of all the parties named, it found only *two* which it regarded as "claimants" who were also "citizens" of diverse states. It first held that if a stakeholder is "interested" in the fund—that is, if it asserts an entitlement to it—then it is also a "claimant" whose citizenship can be considered for jurisdictional purposes. Pet. App. 10a-11a. The court concluded that Respondent Lummis, as the Texas Administrator, met this criterion. *Id.* 10a. As for the second of the two necessary diverse claimants, the court seized upon Petitioner Alvord, the County Treasurer of Los Angeles. Under the prior law of California, the death tax was paid to the county treasurer, who retained a small percentage as a commission and remitted the balance to the State. *See* note 3, *supra.* But, as we shall now show, each prong of this analysis is seriously flawed.

First, the holding of the Court of Appeals that the citizenship of an interested stakeholder can be considered for purposes of establishing interpleader jurisdiction is incorrect, and would lead to a radical and wholly unwarranted expansion of federal jurisdiction. *See* Part II(A), *infra.*[36]

---

36. The Court of Appeals found that the Texas Administrator is an "interested" claimant because he has a legal duty to preserve the Estate's assets. Pet. App. 10a. But if all the states seeking to assert inheritance taxes against an estate would apply the same tax rate, the estate would be a disinterested stakeholder whose citizenship could *not* be considered in determining interpleader jurisdiction. *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939). The same would be true if all the states were among the many whose tax rates were equal to or below the amount allowed as a credit against the federal estate tax. The only claimants in such cases would be the states themselves and interpleader jurisdiction could not be established. This case was different only because the California tax rate (24%) exceeds the Texas tax of 16%.

Second, even if the stakeholder is interested and may properly be considered as a "claimant" for jurisdictional purposes, a second diverse "claimant" must be found. The Court of Appeals found such a claimant in this case due to the happenstance that, at the time the Complaint was filed, the County Treasurer of the County of Los Angeles stood to receive a tiny percentage of the Hughes Estate if Hughes were ultimately determined to have been a California domiciliary. *See* note 3, *supra*. But this feature of California law has now been repealed. *See* note 8, *supra*. For reasons explained in Part II(B), *infra*, that statutory change destroyed any jurisdiction that may once have existed in the present case.[37]

A. The Court of Appeals Erred in Holding That the Citizenship of a Stakeholder Should Be Considered in Determining Whether Interpleader Jurisdiction Exists

The Court of Appeals sustained interpleader jurisdiction because it found that Plaintiff's citizenship (Nevada) was diverse to that of the County Treasurer of Los Angeles (California), and that both Plaintiff and the County Treasurer were "claimants" under the Federal Interpleader Act. Pet. App. 11a.-12a. In so holding, the court explicitly held that the citizenship of an interpleader plaintiff who, in addition to being a stakeholder, also claims an interest in the fund may be considered for purposes of determining whether interpleader jurisdiction exists. *Id.* 11a. Because jurisdiction under the Federal Interpleader Act is premised upon the existence of at least two adverse claimants of diverse citizenship, the decision below necessarily means that the conflicting claims of just *one* interested plaintiff and *one* defendant to a specific fund are a sufficient basis for jurisdiction under the Act. This holding would have a radical, and plainly un-

37. It bears emphasis that *each* of these factors was necessary to the Court of Appeals' decision and that, without any one of them, jurisdiction would not have been established. If, in a future case, the estate is disinterested or neither state happens to share its tax proceeds with a local official, interpleader will not lie. Nor will interpleader be proper in any such case if the Court were to hold that the citizenship of an interested stakeholder may not be considered for purposes of determining interpleader jurisdiction. *See* Part II(A), *infra*. For these reasons, interpleader will rarely, if ever, be an available remedy for the resolution of death tax controversies between states.

desirable, effect on fundamental principles of federal jurisdiction, as several examples illustrate.

First, consider the case in which an insurance company or other institution holds a sum of money which is claimed by X, and X alone. The insurer, a citizen of State A, disputes the claim of X, a citizen of State B. Under the Court of Appeals' opinion, the insurer (which is "interested in" the funds it holds by virtue of its challenge to X's claim) would be a "claimant" of diverse citizenship to X, also a claimant, and could invoke federal jurisdiction under the Federal Interpleader Act. Why should this be permitted? These hypothetical facts describe a garden-variety dispute between two parties which could be settled in state court, or a federal court under general diversity jurisdiction if the $10,000 jurisdictional minimum is satisfied. But if interested stakeholders are "claimants," then nearly every bilateral dispute could be framed to invoke federal interpleader jurisdiction, thereby obtaining for the plaintiff nationwide service of process (28 U.S.C. § 2361) and a greatly reduced jurisdictional minimum. *Compare* 28 U.S.C. § 1332(a) *with id.* § 1335(a) ($500 jurisdictional minimum).

Second, if an interested stakeholder is a "claimant" for purposes of Section 1335, it must also be a "claimant" for purposes of venue under Section 1397, which provides that statutory interpleader actions must be brought where one or more claimants reside. By alleging an interest in the fund, the stakeholder could bring the action in the place of its own residence. Thus, if a Delaware insurer who altogether denies liability seeks to interplead a dozen claimants all residing in California (or there, Washington and Oregon), it could compel them to litigate their claims in Delaware, without regard to their prior contacts with that state.

Third, as the first example demonstrates, the jurisdictional minimum of Section 1332 would be largely frustrated. Virtually *every* "rule interpleader" action, previously thought to have been based on general diversity, could be recast under the Federal Interpleader Act whenever the stakeholder is interested in the fund.[38] There is no indication that Congress intended the Act

38. The prototypical rule interpleader case is one in which the plaintiff-stakeholder is in State A and the defendants-claimants are co-citizens of State B. Such actions fall comfortably within Section 1332 so long as the $10,000 jurisdictional requirement is satisfied.

wholly to displace interpleader actions brought under the usual diversity jurisdiction of the district courts where the $10,000 jurisdictional minimum is not present and where there is no special need for a federal forum with nationwide service. Yet that would be the inevitable result of the Court of Appeals' reinterpretation of Section 1335.[39]

These serious, adverse consequences of the Court of Appeals' holding would not be accompanied by any measurable benefits. Even if the citizenship of the stakeholder administrators who would ordinarily bring an interpleader action to resolve an interstate death tax controversy could be considered for jurisdictional purposes, interpleader jurisdiction could not be successfully invoked unless the administrators also named a defendant who was simultaneously both a "claimant" and a "citizen of a state." For the reasons discussed above, the state taxing officials named as defendants will not be able to fill this jurisdictional lacuna. *See* p. 27, *supra*. While the Court of Appeals in this case found that such an additional defendant existed in the person of the County Treasurer of Los Angeles, this finding was premised on California statutes, since repealed, which gave the County Treasurer a tiny percentage of the Estate if Hughes were adjudged ultimately to have been a California domiciliary. But this "solution" to the jurisdictional problem will not be available in future disputes of this kind. Thus, even if one assumed that the greatly increased burdens on the federal judiciary created by the Court of Appeals' interpretation of the interpleader statute could be justified in the interest of sparing this Court's original jurisdiction of the necessity to resolve interstate death tax disputes by providing an alternative forum, no such benefit will in fact be attained. The Court of Appeals decision should be reversed to avoid a radical and unwarranted expansion of federal jurisdiction.

---

39. Neither the cases cited by the Court of Appeals (*Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 488 (D. Md. 1962) and *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 477 & n.8 (E.D. La. 1960)), nor Professor Wright, upon whom the court below also relied (Pet. App. 11a.), appear to have considered most of these serious disruptions to the federal jurisdictional scheme which would be caused by treating an interpleader plaintiff as a claimant for jurisdictional purposes.

B. The Court of Appeals' Finding of Jurisdiction Has Been Superseded by Changes in California Law

As noted above, the Court of Appeals found interpleader jurisdiction to exist in this case because it found the requisite minimal diversity between Respondent Lummis, the Texas Administrator, and Petitioner Alvord, the County Treasurer of the County of Los Angeles. Jurisdiction was thus found to exist in this case solely because of the unusual circumstance that, under California law at the time the Court of Appeals opinion was rendered, the *state* death tax was collected by a *county* treasurer, who retained a tiny fraction of the tax as compensation for that administrative service and was required to remit the balance to the State of California. Because the citizenship of a county officer, unlike that of a state officer, may be considered for diversity purposes, Petitioner Alvord was held to be a claimant and a citizen of California, of diverse citizenship with Respondent Lummis.

On January 1, 1981, however, California law regarding inheritance tax procedure was completely revised. On that date, AB 2092 (Chapter 634 of the California Statutes of 1980), became effective. This statute repealed Sections 14791-95 of the California Revenue and Taxation Code (which previously had provided for payment to the County Treasurer of the inheritance tax, retention by him of a "commission" and transmittal to the state of the balance) and amended Cal. Rev. & Tax. Code § 14104 to require payment of the tax to the State Controller. Pet. App. 19i, 36i. These statutory changes eliminated Petitioner Alvord's interest in the Hughes inheritance tax, as he is no longer entitled to receive a portion of any inheritance tax paid after January 1, 1981.[40] Pet. App. 38i.

---

40. Although legislative "motive" is irrelevant to any issue before this Court, we nevertheless wish to assure the Court that the 1980 revision to California's inheritance tax law—and specifically the elimination of the county treasurer's participation in death tax collections—was entirely independent of this case and made without any consideration (or even appreciation) of the effect it would have on federal interpleader jurisdiction here. As can be seen from an examination of the legislation (which is reprinted as Pet. App. "I"), the revisions are extensive. The particular provisions concerning the role of the county treasurers had been proposed for many years. Special counsel for California played no role, direct or indirect, in the formulation of this legislation.

Whatever may have been the case when the Court of Appeals rendered its original decision, it is now clear that Alvord is no longer a claimant to any portion of the funds which are the subject of the interpleader action (*i.e.*, the Hughes Estate); in the language of the Act, Alvord is no longer a person who is "claiming or may claim to be entitled to . . . money or property" in the stakeholder's custody or possession. 28 U.S.C. §1335. Because Alvord is no longer a "claimant," he is not a proper party and the action against him must be dismissed. The required presence of at least two adverse claimants of diverse citizenship does not now exist, and federal interpleader jurisdiction thereby fails. *See Kennametal, Inc. v. International Union*, 161 F. Supp. 362 (W.D. Pa. 1958) (abandonment of claim by one of two claimants terminates jurisdiction under §1335); *Dakota Livestock Co. v. Keim*, 552 F.2d 1302, 1306 (8th Cir. 1977).

Respondents invoke the rule that jurisdiction is ordinarily measured as of the date the complaint is filed, and urge that this subsequent development be ignored. But it has long been settled that where the addition or deletion of a party *after* the complaint has been filed affects the existence of diversity of citizenship, jurisdiction must be re-determined in light of that changed circumstance. This principle has been applied in a wide variety of contexts:

> (1) The joinder of additional defendants whose citizenship is the same as the plaintiff will destroy diversity jurisdiction. (Accordingly, the courts often state that such joinder should not be allowed or required unless such defendants are indispensable parties.)[41]
>
> (2) Similarly, the joinder of an additional plaintiff who is a citizen of the same state as a defendant will oust the court of jurisdiction.[42]

---

41. *E.g.*, *Stanhope v. Ford Motor Credit Co.*, 483 F. Supp. 273 (W.D. Ark. 1980) (removed case remanded to state court where plaintiff amended complaint to add nondiverse defendant); *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 628-29 (2d Cir. 1976); *Haas v. Jefferson Nat'l. Bank*, 442 F.2d 394 (5th Cir. 1971) (dismissal after District Court had ordered joined an indispensable party whose presence destroyed diversity); *Reynolds v. Wabash R.R. Co.*, 236 F.2d 387 (8th Cir. 1956); *Wallace v. Knapp-Monarch Co.*, 234 F.2d 853, 860 (8th Cir. 1956).

42. *E.g.*, *Adams Express Co. v. Denver & Rio Grande Ry.*, 16 F. 712 (C.C.D. Colo. 1883); *cf. Gaddis v. Junker*, 27 F.2d 156, 159 (E.D. Tex.

(*continued*)

(3) Conversely, when after the filing of the complaint the plaintiff undertakes to correct a defect of jurisdiction by dismissing non-diverse defendants, jurisdiction will be re-determined following such dismissal.[43]

(4) Where the original complaint includes two or more plaintiffs, some of whom are citizens of the same state as a defendant, the jurisdictional defect can be eliminated by dismissing the non-diverse plaintiff(s), following which jurisdiction is re-determined.[44]

(5) Intervention of an indispensable party who is a citizen of the same state as the intervenor's opposing party destroys diversity jurisdiction, as measured at the time of intervention.[45]

(6) Permissive intervention of a *non*-indispensable party who is a citizen of the opposing party's state also destroys jurisdiction.[46]

(*footnote continued*)
1928) (treating intervenors who joined with the cooperation of plaintiffs as "in the category of plaintiffs" and holding that their joinder destroyed diversity jurisdiction); *Forest Oil Co. v. Crawford*, 101 F. 849 (3d Cir. 1900) (same).

43. *E.g., Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1068-69 (3d Cir. 1979); *Fetzer v. Cities Serv. Oil Co.*, 572 F.2d 1250, 1253 n.4 (8th Cir. 1978); *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572, 575-76 (5th Cir. 1976); *Finn v. Am. Fire & Cas. Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954). In *Finn*, the Court had determined on a prior appeal after a trial that the District Court lacked diversity jurisdiction; on remand, the District Court dismissed the non-diverse defendant and reinstated the judgment. The Court of Appeals held that by doing so, the District Court cured the lack of jurisdiction.

44. *E.g., Alderman v. Elgin, J. & E. R.R. Co.*, 125 F.2d 971 (7th Cir. 1942); *Drumright v. Texas Sugarland Co.*, 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927); *Allstate Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 204 F. Supp. 83 (D. Conn. 1962).

45. *Chance v. County Bd. of School Trustees*, 332 F.2d 971 (7th Cir. 1964); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011, 1015 (6th Cir. 1948); *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926), *cert. denied*, 273 U.S. 758 (1927); *Fryer v. Weakley*, 261 F. 509 (8th Cir. 1919).

---

46. *E.g., Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 197 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952) (allowing State

(*continued*)

In short, the presence or absence of diversity jurisdiction is re-determined *after* there has been an addition or elimination of a party.[47] By the same token, the question of interpleader jurisdiction—which depends on diversity—should now be re-examined in light of the statutory elimination of the County Treasurer's interest in this action.

That re-examination can have only one result. Because Petitioner Alvord no longer claims any property in Plaintiff's custody or possession (*i.e.*, any portion of the Hughes Estate), he is no longer a "claimant" within the meaning of the interpleader statute. The Court of Appeals' finding that interpleader jurisdiction existed in this case was based on a premise which is no longer applicable:

(*footnote continued*)
of Texas to intervene was error because it was not a "citizen of a state" and, if uncorrected, its "presence would destroy the jurisdiction of the court"); *Johnson v. Riverland Levee Dist.*, 117 F.2d 711, 715 (8th Cir. 1941) (intervention with consent of plaintiff by a party residing in same state as defendant "destroys the jurisdiction of the court"); *Forest Oil Co. v. Crawford*, 101 F. 849 (3d Cir. 1900).

A different rule exists where the suit is a class action and the intervenor is a member of the class or where the controversy between the intervenor and the opposing parties is "ancillary" to the main action (as when the intervention is "as of right" under F.R. Civ. P. 24(a)). Neither of these rules is applicable here, either directly or by analogy. This is not a class action; and there is no "ancillary" dispute, the only issue before the Court being that of the domicile of Hughes for inheritance tax purposes.

47. A different rule applies when there is a *pro forma* substitution of one party for another, as where a party dies and his or her executor is substituted in. But even this exception does not govern where the substitution changes the nature of the action or the nature of the right asserted therein, in which event jurisdiction is re-determined as of the time of substitution. *Grady v. Irvine*, 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958); *see also Rippey v. Denver U.S. Nat'l Bank*, 42 F.R.D. 316 (D. Colo. 1967).

Professor Wright's Treatise states that "a change of parties, by addition, substitution, or elimination . . . will not divest the court of jurisdiction if the nature of the action remains the same . . . ." 13 WRIGHT, *supra*, § 3608, at 656-57. A careful reading of this section suggests that Professor Wright is referring here to the rules applicable to (1) *pro forma* substitution, as discussed in the preceding paragraph (*see id.* at 659-60); and (2) the addition of parties as a consequence of the *defendant's* action, as by impleader, compulsory counter-claim or cross-claim, which are treated as within the *ancillary* jurisdiction of the court. *See id.* at 657. Professor Wright does not suggest that the rules outlined in text are any different than those stated here.

there are no longer two claimants of diverse citizenship, but (at most) one.[48] Hence whatever jurisdiction may once have existed in the District Court vanished when Petitioner Alvord's claim to the Hughes Estate was eliminated by the change in California law.

III.

THIS ACTION IS BARRED BY THE ELEVENTH AMENDMENT[49]

In *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), a unanimous Court, speaking through Chief Justice Stone, held an action identical to this one barred by the Eleventh Amendment. That decision has never been overruled, although four Justices of this Court have questioned its continuing validity. *California v. Texas*, 437 U.S. 601 (Brennan, J., concurring), 608 n.10 (Stewart, J., concurring), 615 (Powell, J., concurring).

The Court of Appeals refused to apply the Eleventh Amendment because it found that the relief sought against the California and Texas taxing officials in this case is prospective. Pet. App. 7a-8a. But even if that were so, the Eleventh Amendment inquiry does not end there. Under *Ex parte Young*, 209 U.S. 123 (1908), a suit against a state official alleged to be acting illegally or unconstitutionally may be maintained consistently with the Eleventh Amendment, since the official "is in that case stripped of his official or representative character . . . ." *Id.* at 160. But, as the District

---

48. The Court of Appeals' refusal to reconsider interpleader jurisdiction in light of California's statutory revision has led to a bizarre result: jurisdiction has been sustained because of the happenstance that, under the law as it stood on the date the complaint was filed, Alvord held a tiny fraction of the California tax claim even though (1) the law has subsequently changed, and Alvord no longer holds any such claim or has the slightest interest in this case; (2) there is now only *one* proper party —the Texas Administrator—who could conceivably qualify as both a "claimant" and a "citizen" of a state under the Interpleader Act (and his citizenship may only be considered at the cost of radically expanding federal jurisdiction); (3) if an identical case arose tomorrow, it could not be brought in the district court under the Interpleader Act; and (4) all of this became clear before any final determination of the issue of jurisdiction in a case which has not yet passed beyond the pleading stage.

49. While this issue was not presented in the Petition for Certiorari, it is jurisdictional (*Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974)), and may therefore be considered by the Court. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 (1980); *see* Stern and Gressman, SUPREME COURT PRACTICE 459 (5th ed. 1978).

Court found, there is no substantial claim here that the taxing officials of California and Texas are acting unconstitutionally and/or illegally in seeking to tax the Estate. Pet. App. 6d; *see also California v. Texas*, 437 U.S. 601, 612 & n.13 (Stewart, J., concurring). Since there is no substantial claim that Petitioners are acting illegally, the fiction of *Ex parte Young* does not apply. This action is therefore one against the State of California and thus barred by the Eleventh Amendment.

IV.

IF INTERPLEADER JURISDICTION IS UPHELD, TRANSFER UNDER 28 U.S.C. § 1404(a) IS REQUIRED

If, despite the jurisdictional arguments discussed in the prior sections, this case is to be heard in a district court pursuant to the Federal Interpleader Act, it will be imperative that the case be transferred to a forum whose citizens—and thus whose jurors—are wholly disinterested. Such a "neutral forum" is available in this case: the District of Colorado.

The compelling reasons for transfer in order to provide a fair trial on the issue of domicile have already been discussed. *See* pp. 11-16, *supra*. The District Court did not reject these arguments, but held that because no "claimant" presently a party to the suit resides in Colorado, or in any other state not claimed by some party to be the domicile of Howard Hughes, transfer under Section 1404(a) is foreclosed. Under Section 1404(a), an action may only be transferred to a district where it might have been brought in the first instance. *See Hoffman v. Blaski*, 363 U.S. 335 (1960). However, California moved under Rule 19 to add as parties persons who should have been joined in the first instance: the acknowledged heirs of Howard Hughes who, if a California domicile is found, will have *personal* liability for payment of the California death tax.[50] At least one of those heirs resides in the District of

50. California sought to join the twenty-two persons acknowledged by the Estate to be the lawful heirs of Howard Hughes. The Texas Administrator is a party to a settlement agreement among those heirs which stipulates that they are lawful heirs, and determines the percentage each is to take. A. 24-26, 31, 43, 128; R. I, 99 & Exhibits F. Although in the courts below it was suggested that other claimants to the Hughes Estate would also have to be joined, the articulation of that supposed concern is purely tactical. No party to this action asserts a belief that any of the

(*continued*)

Colorado. A. 24-25, 27, 34, 141-44. Had the heirs been joined, transfer to that district could have been accomplished.[51] It is there-

---

(*footnote continued*)
some 400 others who have filed claims of heirship will establish an entitlement to participate in the Estate. Indeed, Plaintiff, as an administrator of the Estate, has disputed these various heirship claims in the Texas probate proceedings.

In any event, the Texas probate court has confirmed the claims of some fourteen maternal heirs—all parties to the settlement agreements—and the heirship claims on the paternal side are presently being tried. It is therefore likely that by the time this Court rules, the Texas probate court will have determined whether any of those other heirship claims has merit. Any person found to be a lawful heir of Hughes may, of course, be joined as an additional party. In the meantime, if either Texas or the Estate has a genuine concern that the omission of any of these persons might jeopardize the ability of the District Court to bind all interested parties, it is free to join them.

51. The Estate and Texas argued below that under *Hoffman v. Blaski*, 363 U.S. 335 (1960), the transfer standards of Section 1404(a) must be applied against the original complaint, and that the addition of additional defendants, residing in additional forums, if caused by the granting of a Rule 19 motion and the subsequent amendment to the complaint, could not be considered. This argument is without merit.

Hoffman v. Blaski held only that a *defendant* may not *create* a permissible venue transfer by waiving jurisdictional and venue objections to an otherwise impossible alternative forum desired by him. It does not hold, or even imply, that a *plaintiff* can *foreclose* venue transfers by omitting necessary parties. Nor does it address the situation in which an amended complaint is filed by the plaintiff or compelled by the granting of a Rule 19 motion.

Amended pleadings "supersede[ ] the pleadings [they] modif[y] and remain[ ] in effect throughout the action . . . ." 6 WRIGHT, *supra*, § 1476, p. 389. Transfer motions often occur after complaints have been amended. To our knowledge, every court which has faced this situation has looked to the amended complaint, not the original, to determine the potential transferee forums. *See, e.g., Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 447 F. Supp. 381 (N.D. Okla. 1978); *Weiss v. Sunasco, Inc.*, 295 F. Supp. 824 (S.D.N.Y. 1969) (motion for change of venue denied where defendants named in amended complaint not amenable to service in transferee forum); *Silbert v. Nu-Car Carriers*, 111 F. Supp. 357 (S.D.N.Y. 1953) (parties stipulated during hearing on change of venue motion that additional defendant could be joined; transfer denied because newly added defendant not amenable to suit in transferee forum). Other cases also demonstrate that it is the amended complaint, not the original one, to which courts look in passing upon change of venue motions. *E.g., Toro Co. v. Alsop*, 565 F.2d 998 (8th Cir. 1977); *Ipco Hospital Supply Corp. v. Les Fils d'Auguste Maillefer*, 446 F. Supp. 206 (S.D.N.Y. 1978); *(continued)*

fore necessary first to consider the Court of Appeals' holding that the motion to add parties was properly denied.

A. The Motion to Add Parties Should Have Been Granted

Rule 19(a) requires joinder of persons "having an interest in the controversy . . . who ought to be made parties, in order that the court may . . . finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."[52]

(footnote continued)
American Medicorp, Inc. v. Humana, Inc., 445 F. Supp. 573, 578 (E.D. Pa. 1977); *Securities & Exchange Commission v. Penn Central Co.*, 450 F. Supp. 908, 911 n.2 (E.D. Pa. 1978); *Watwood v. Barber*, 70 F.R.D. 1 (N.D. Ga. 1976); *see also Bastille Properties, Inc. v. Hometels of America, Inc.*, 476 F. Supp. 175, 178 (S.D.N.Y. 1979) (addition of new party under Rule 19(a) might make venue improper and necessitate transfer under 28 U.S.C. § 1406(a)) and *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 240 n.16 (8th Cir. 1979) (plaintiff could not object to transfer on ground that one defendant not amenable to service of process in transferee forum where district court dismissed that defendant from suit).

Of course, if the rule were otherwise, a defendant added to the complaint by amendment would be unable to move the court for transfer to his place of residence if no other defendant resided in that district. But that is not the law. *See Xerox Corp. v. Litton Industries, Inc.*, 353 F. Supp. 412 (S.D.N.Y. 1973).

These cases reflect a common-sense approach. A rule prohibiting the court from considering the presence of parties added by amended complaints would provide an incentive for plaintiffs to leave necessary parties out of their complaints in order to frustrate potential change of venue motions. To hold that the number of potential transferee forums remains forever fixed by the original complaint—even though the court later orders that defects in the complaint be remedied by joining defendants *who under Rule 19 should have been named in the original complaint*—would reward litigants for leaving out essential parties from their pleadings in violation of the Federal Rules. As the Court stated in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), "the limiting phrase of § 1404(a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just." *Id.* at 624.

52. Rule 19, as revised in 1966, raises two distinct questions, only one of which is presented in this case. The first, posed by Rule 19(a), is whether the absent persons *should* be joined if it is feasible to do so. The second question, addressed by Rule 19(b), arises whenever a person should be joined under Rule 19(a) but for some reason "cannot be made a party"; in that event, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or

(continued)

Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1855).

The need for a judgment which binds the heirs as well as the various administrators of the Estate is rooted in aspects of the California inheritance tax law which differ in important respects from the federal estate tax. The California tax is *not* an estate tax levied on the estate as an entity, but a tax on the transfer of property which is levied upon the *transferee*. Thus, under California law, the heirs are "*indispensable part*[*ies*] to that portion of the proceeding in which inheritance taxes [are] fixed . . . ." *Allen v. Flournoy*, 26 Cal. App. 3d 774, 781, 87 Cal. Rptr. 275, 279 (1972) (emphasis added).[53]

The inability of the District Court to "finally determine the entire controversy, and do complete justice, by adjusting all the

---

(footnote continued)
should be dismissed, the absent person being thus regarded as indispensable." The latter question is not presented here because there is no impediment to the addition of the heirs as parties. This is so because (1) a statutory interpleader action under 28 U.S.C. § 1335 requires only diversity between two or more claimants, and not complete diversity (*State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967)) and therefore the inclusion of Texas or California heirs would not destroy jurisdiction; and (2) there is nationwide service of process in a statutory interpleader action. 28 U.S.C. § 2361.

Accordingly, because the absent heirs *can* be joined, the only question posed by the motion is whether, under Rule 19(a), they *should* be joined. In other words, because the joinder of the absent heirs is feasible, the distinction between "necessary" and "indispensable" parties is irrelevant for present purposes.

53. *See generally Cohn v. Cohn*, 20 Cal. 2d 65, 68, 123 P.2d 833, 834-35 (1942); *Estate of Hendricks*, 11 Cal. App. 3d 204, 89 Cal. Rptr. 748 (1970); *Estate of McLaughlin*, 243 Cal. App. 2d 516, 520-21, 52 Cal. Rptr. 543, 545-46 (1966) and authorities cited; 23 CAL. JUR. 3d *Death and Gift Taxes* §§ 1, 120, 121.

The personal liability of the heirs for inheritance taxes is underscored by Section 14322 of the Revenue and Taxation Code, which authorizes the Controller in collecting the tax to levy upon *all* property of an heir, and not just assets distributed to him by the estate. Thus if the assets of the estate prove to be insufficient to pay the tax, or are lost during administration (*cf. Estate of Hite*, 159 Cal. 392, 113 Pac. 1072 (1911) (portion of estate embezzled); 18 Cal. Admin. Code § 13601.1 (transfer of assets lost during administration is nevertheless taxed)), the heir will be personally liable and his own assets may be reached. Liability for payment of the inheritance tax in California is not that of the estate or the administrator; *it is imposed upon the heirs and beneficiaries*. That liability is personal, and extends to their own assets.

rights involved in it" without the presence of the absent heirs is apparent in light of these fundamentals of state law. If the District Court were to proceed in the absence of the heirs and render a final judgment determining that Howard Hughes was a domiciliary of California, these federal proceedings would be at an end: Texas would be enjoined from attempting to collect a domicile-based tax, and California would be free to proceed in its own courts to value the Estate's assets and to collect death taxes according to its own laws. But there is a substantial risk that the heirs, *on whom the California death tax falls*, will not regard themselves as bound by a judgment to which they are not parties.

Plaintiff's response has been that the absent heirs are in "privity" with the Estate's administrators and will be bound by any judgment rendered against those administrators. While there is substantial reason to doubt that this is so,[54] that question need not be resolved, for whether or not the absent heirs are in privity with the administrators they must be joined.

If the heirs are *not* in privity with the administrators, then a classic case for joinder is established under Rule 19(a)(1), which requires joinder of a party "if . . . in his absence complete relief cannot be accorded among those already parties . . . ." If the purpose of a statutory interpleader here is "to obtain a *single, binding* determination of the decedent's domicile at the time of his death (*California v. Texas, supra* at 607 (Stewart, J., concurring) (emphasis added)), proceeding where the heirs are neither parties nor in privity with a party would fall short of that objective. Without the power to bind the heirs to a judgment affecting *their* personal

---

54. The privity issue is a substantial one. Ordinarily, of course, an heir is bound by litigation concerning *estate* assets or *estate* liabilities to which the estate representative was a party. Indeed, in such suits, the heir is normally not even regarded as a *proper* party. See 3A MOORE'S FEDERAL PRACTICE ¶ 17.12, p. 17-149.

But here the suit involves potential tax liability of the *heirs*, not the estate as an entity. Unlike a suit on behalf of, or against, an estate, in which the heirs *cannot* participate as parties, the heirs *are* proper parties in a proceeding to fix inheritance taxes. *E.g.*, TEX. TAX.-GEN. ANN. art. 14.11(c)(3), (4); CAL. REV. & TAX. CODE § 14510. In the courts below, Texas and the Estate were unable to discover *any* authority that a non-party heir will be bound by an *in personam* judgment against a representative determining liability for state death taxes.

liability for death taxes, the "district court [would be unable] to finalize the litigation or to effectively adjudicate the rights of all concerned parties." *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885, 888 (5th Cir. 1968).

On the other hand, if—as the Estate contends—the heirs *are* in privity with the administrators, and would thus be bound by a judgment rendered in this case, then their joinder is required by Rule 19(a)(2) because they are persons who "claim[ ] an interest relating to the subject of the action and [are] so situated that the disposition of the action in [their] absence may (i) as a practical matter impair or impede [their] ability to protect [their] interest . . . ." Rule 19(a)(2)(i). The point is self-evident: a judgment of the District Court finding a California domicile (should that be its ruling), if binding upon the heirs through the doctrine of "privity," would lead to the imposition of a substantial tax liability upon each of them. No plainer case for the applicability of Rule 19(a)(2)(i) can be conceived.

This is precisely the holding of *Bry-Man's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963). In that case, a diversity suit was brought by one of two joint obligees of a debt. The other joint obligee, one McEvoy, was not joined, and was expected to litigate his claim in a state court. The Court of Appeals held that if McEvoy was *not* in privity there was the "highly inequitable" risk of inconsistent adjudications. 312 F.2d at 588 n.6. On the other hand, if McEvoy *was* in privity, his joinder would also be required:

> "On the other hand even if McEvoy in his suit in the state court were found to be bound by the previous action by Stute [in federal court] under the doctrine of res judicata as being a privy to that action, *then the other inequity to be prevented by the equitable doctrine of indispensability would raise its ugly head, viz., where adjudication would necessarily 'affect' the rights of the absent party. See* Restatement of the Law, Judgments, § 102. And *see Keegan v. Humble Oil & Refining Co.*, 5 Cir., 155 F.2d 971." (*Id.* at 588 n.6 (emphasis added)).

Accord, Gottlieb v. Vaicek, 69 F.R.D. 672 (N.D. Ill. 1975).

To our knowledge, no federal court has ever refused to join an otherwise necessary party, who could feasibly be joined, on the ground that it was in privity with a party. To the contrary, the

reported cases show exactly the opposite: a person in privity with an interest in the litigation must nevertheless be joined.[55] Certainly the text of Rule 19 suggests no such an exception. Indeed, it requires joinder where the court hearing the case is prevented by a party's absence from according "complete relief . . . among those already parties." Rule 19(a)(1). That standard is not met where "complete relief" requires a *second* suit, against one not party to the first, to enforce a judgment on a theory of privity.[56]

The Court of Appeals did not discuss any of these matters. It simply asserted that, under Rule 17, the administrator is a "real party in interest" who is authorized to sue in his own name without joining with him the estate's heirs for whose benefit the action is brought. Pet. App. 12a. In effect, the court engrafted an exception upon the general joinder requirements of Rule 19: if a party is a "real party in interest" purporting to represent the interests of non-parties, the non-parties need not be joined even though Rule 19 would otherwise require their joinder. In this, the Court of Appeals erred.

---

55. *Reserve Min. Co. v. Environmental Protection Agency*, 514 F.2d 492, 533-34 (8th Cir. 1975) (en banc) held that it was proper for the District Court to have joined two parties (Aramco and Republic) as necessary parties under Rule 19(a)(1) even though they were in privity with parties to the proceedings. In *Willingham v. Star Cutter Co.*, 555 F.2d 1340, 1345 (6th Cir. 1977), a defendant's motion to join the co-owner of plaintiff's patent was granted notwithstanding the possibility that the absent owner would be barred by res judicata:

> "Finally, we consider the interest of a defendant in avoiding multiple suits concerning the same patent. Defendants in an infringement suit initiated by a single joint owner could have a justifiable fear that should they prevail and the court determine that the patent in suit is either invalid or not infringed, the remaining joint owners might still relitigate these issues at a later date in another costly and vexatious proceeding. Even though remaining joint owners might be bound under the traditional doctrines of collateral estoppel or res judicata, and despite the fact that such a repetitive suit may be an appropriate case for the awarding of attorney fees to defendants[,] defendants still could be prejudiced."

56. Since the heirs are not parties to this proceeding, they will be free to test the issue of their privity in a separate proceeding. For example, if the District Court were to find a California domicile, the absent heirs would be free to claim in a subsequent proceeding to collect the tax that they were not in privity with the administrators. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912). As a result, the

(continued)

Professor Wright describes the relationship between Rules 17(a) and 19 with characteristic clarity:

> "In order to apply Rule 17(a) properly, it is necessary to identify the law that created the substantive right being asserted by plaintiff. As is discussed more fully elsewhere, that question often involves problems of distinguishing between the substantive statutes creating the right being enforced by plaintiff and procedural statutes prescribing in whose name the action may be brought. And in some cases, it may raise difficult conflict of law questions.
>
> "The second sentence of Rule 17(a) contains a specific enumeration of a number of persons who are real parties in interest. The purpose of the listing is to provide guidance in cases in which it might not be clear who the real party in interest is and to emphasize the fact that he might not be the person beneficially interested in the potential recovery. Of course, the language assumes that the applicable substantive law gives the persons named in the rule the right to sue. *Although it has been argued that an exception to the joinder requirements of Rule 19 is created by the portion of Rule 17(a) stating that anyone listed 'may sue in his own name without joining with him the party for whose benefit the action is brought,' several courts have rejected this interpretation and have held that Rule 17(a) assumes that the joinder of those beneficially interested in the action is not otherwise required. As a result, Rule 19 always must be consulted to determine if all the necessary parties have been joined.*" (6 WRIGHT, *supra*, Civil § 1543, pp. 644-45 (emphasis added))[57]

(*footnote continued*)
interpleader court *cannot* accord "complete relief" to California; that will require that a *second* court adjudicate the question of privity and hold that the heirs were bound by the District Court's judgment. Rule 19 forbids two lawsuits where the issues can be settled in one.

57. Until the Court of Appeals' decision in this case, the courts have uniformly regarded the standards of Rule 19 as fully applicable notwithstanding the presence of a "real party in interest" authorized to sue by Rule 17. "The determination that [plaintiff] is a real party in interest (*continued*)

The heirs are the persons who will be *personally* liable for the tax if a California domicile is found. Under Rule 19, their joinder is required.

B. Transfer Under Section 1404(a) Is Required

With the joinder of the heirs, transfer under Section 1404(a) is permitted. Thus the sole ground given by the courts below for denying transfer will be swept away.

For the reasons already discussed (*see* pp. 11-16, *supra*), a trial of the rival Texas and California tax claims before a jury of Texas citizens would be inappropriate and unfair. Every Texas juror would know that the state of his or her citizenship would stand to gain a massive sum of money if a Texas domicile were found. They would also know that the pecuniary interest of each juror would be matched by an identical pecuniary interest for each man, woman and child in Texas. It asks a very great deal of fallible human beings to put knowledge of this kind aside. Our legal tradition does not require the citizens of California to trust that Texas jurors, sitting in judgment on California's rival tax claim, will achieve objectivity in the face of these formidable challenges.

Transfer to a district court not situated in one of the claimant states would serve some of the same ends as an original proceeding in this Court. Not only would the jurors be economically disinterested, but they would be immune from appeals to regional chauvinism—such as were made in the prior state court trial (*see* note 19, *supra*)—which could have grave impact on jurors drawn from the state claiming that Howard Hughes never abandoned his intent that Texas remain his permanent home.

(footnote continued)
under Rule 17(a) . . . *does not dispose of the question of whether all necessary parties* to the litigation have been joined." *Int'l. Rediscount Corp. v. Hartford Acc. & Indem. Co.*, 425 F. Supp. 669, 676 (D. Del. 1977) (emphasis added). *Accord, Smallwood v. Days Transfer, Inc.*, 165 F. Supp. 929 (W.D. Mich. 1958); *Carlson v. Consumers Power Co.*, 164 F. Supp. 692 (W.D. Mich. 1957); *see also Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973); *Capital Fire Ins. Co. v. Langhorne*, 146 F.2d 237 (8th Cir. 1945); *Brown v. Fisher Skylights, Inc.*, 31 F.R.D. 532 (E.D.N.Y. 1962); *Morelli v. Northwest Engineering Corp.*, 30 F.R.D. 522, 524 (E.D. Wis. 1962).

It is no answer to say that the District Court can be expected conscientiously to conduct *voir dire*. No amount of questioning can eliminate the taint of self-interest. Moreover, whatever may be the ability of a conscientious district judge to so carefully screen prospective jurors as to minimize the dangers of a less than impartial trier of fact, no one will be under the illusion that such a trial will *appear* fair to the citizens of California. While our traditions of federalism are evolutionary, we have not yet reached the point where citizens of one state can realistically be expected willingly to submit a bi-state death tax dispute of this magnitude to a jury drawn from citizens of the rival state. Only by transfer to a disinterested forum can the appearance of impartial justice—and its actuality—be attained.

CONCLUSION

The judgment of the Court of Appeals must be reversed. At a minimum, the decisions to deny joinder of the heirs and, for that reason, to deny transfer to a disinterested forum were in error. *See* Part IV, *supra*. But more fundamentally, the District Court lacks jurisdiction of this action. Jurisdiction is precluded by 28 U.S.C. § 1251(a), because at bottom this is a controversy between two states. *See* Part I, *supra*. Moreover, the jurisdictional requirements of the Federal Interpleader Act simply have not been satisfied; although the Court of Appeals found the requisite two "claimants" who are "citizens" of a state, one is the plaintiff-stakeholder, whose citizenship should not be considered for purposes of 28 U.S.C. § 1335 (*see* Part II(A), *supra*) and the other is the County Treasurer of Los Angeles, who no longer has any interest in the "fund" and must be dismissed. *See* Part II(B), *supra*. The Eleventh Amendment also bars this action. *See* Part III, *supra*.

The Estate will undoubtedly respond that these jurisdictional arguments, however technically compelling, should be rejected because they leave it without a remedy against the possibility of inconsistent state court adjudications of domicile and the imposition of death taxes by both California and Texas. But, of course, that is not the inevitable consequence. California's companion Motion for Leave to File Complaint in *California v. Texas*, No.

88, Orig., asks this Court to exercise its original jurisdiction, as it did in *Texas v. Florida, supra,* to render a single, binding determination of domicile.

We frankly concede, however, that a finding that the District Court lacks jurisdiction does not automatically require the granting of that Motion, even if that holding were based upon the exclusive jurisdiction provisions of Section 1251(a). For, as we have shown (*see* pp. 25-26, *supra*), the Court could theoretically conclude that even though Section 1251(a) precludes the exercise of district court jurisdiction under the Interpleader Act, equitable or prudential considerations—such as those urged by Justice Stewart in his concurring opinion in *California v. Texas, supra*—foreclose the exercise of original jurisdiction at this time.[58]

The Estate may justly respond that, as Professor Chafee wrote, "[s]omewhere within [the] federal system we should be able to find remedies for the frictions" caused by multiple state death tax claims based on inconsistent assertions of domicile. Chafee, *Federal Interpleader Since the Act of 1936,* 49 Yale L.J. 377, 388 (1940), quoted in *California v. Texas, supra,* at 608 n.9 (Stewart, J., concurring). But that surely must be understood as an appeal for a *legislative* solution and not for a judicial rewriting of unambiguous statutes. We have demonstrated that the clarity of the language of Sections 1251(a) and the Interpleader Act is matched by an absence of the slightest indication that Congress intended the Interpleader Act to provide a means of adjudicating rival state death tax claims, or viewed it as an exception to the exclusive jurisdiction given this Court to hear controversies between states. The Estate would have the Court recast what Congress has written to achieve a result which it regards as just; but the Court cannot achieve that result without violence to the intent of Congress and—if that were not enough—without achieving a wholly unsuitable remedy for the resolution of controversies of this nature: an action which ordinarily cannot be brought in or transferred to a disinterested forum. *See* pp. 10-11, *supra.*

---

58. We trust that the Court will appreciate the conditional nature of this statement. With all respect, we believe that the analysis of Justice Stewart's arguments against the exercise of original jurisdiction presented in California's Motion for Leave to File—arguments not presented in the 1978 proceeding—convincingly shows that the exercise of original jurisdiction is entirely warranted, and fully in keeping with precedent.

Accordingly, there surely can be no stronger case for the application of the Court's frequent admonition that such matters are for Congress to resolve, even though the results which follow from the present statutory structure are not wholly satisfactory. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, — U.S. —, 49 U.S.L.W. 4537, 4542 (1981); *Northwest Airlines, Inc. v. Transportation Workers*, — U.S. —, 49 U.S.L.W. 4383, 4388-89 (1981); *TVA v. Hill*, 437 U.S. 153 (1978). No one will dispute that Congress might wisely craft an exception to the Court's exclusive original jurisdiction so as to provide an alternative forum for adjudicating conflicting state death tax claims. Surely one element of such a statutory scheme would assure that domicile was not determined by laymen from a claimant state. But it is equally plain that Congress has not done so, despite decades of academic criticism of the uncertainties and anomalies traced in Justice Stewart's historical narrative in *California v. Texas, supra*, 437 U.S. at 607-610. That being the case, the Court's observation in *Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 47 (1979) is equally applicable here:

"Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' "

Dated: August 28, 1981.

Of Counsel:
MYRON SIEDORF
Chief Inheritance
Tax Attorney
Division of Tax
Administration
Office of the State
Controller
State of California

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE,
NEMEROVSKI, CANADY
& POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, CA 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS
& SHAPIRO
Capital National Bank Building
12th Floor
Post Office Box 1148;
Austin, Texas 78767
(512) 472-8422

Attorneys for Petitioners

**Counsel of Record*

Office - Supreme Court, U.S.
FILED
OCT - 8 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80—1556

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONTROLLER OF THE STATE OF CALIFORNIA
AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,

Petitioners,

V.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS WHITE AND BULLOCK

RICK HARRISON*
PATTON G. LOCHRIDGE
McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
(512) 476-6982

DAVID DEADERICK*
GIBBINS, BURROW, WASH & BRATTON
Post Office Box 1452
Austin, Texas 78767
(512) 474-2441

* *Counsel of Record*

MARK WHITE
Attorney General of Texas

GILBERT J. BERNAL, Jr.
Assistant Attorney General
Chief, Taxation Division
Post Office Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-4721

Attorneys for Respondents White and Bullock

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

Introduction 7

I. The Resolution of the Issues Presented Hinges on the Eleventh Amendment Question 10

A. If This Action Is Not Barred by the Eleventh Amendment, Interpleader Jurisdiction Is Satisfied 12

1. 28 U.S.C. §1251(a) Is Irrelevant to Jurisdiction Under 28 U.S.C. §1335 13

2. The Diversity Requirement of 28 U.S.C. §1335 Is Met 14

B. If the Eleventh Amendment Bars This Action, State Courts Should Resolve This Controversy Over State Inheritance Taxes 18

1. Original Jurisdiction In This Court Is Not Present 18

2. The Texas Probate Court Has Jurisdiction Over All Parties Necessary to This Action 22

II. Venue of This Action Is Now Properly Laid 24

A. The Lower Courts Correctly Denied Petitioners' Motion to Add Parties 25

B. The Lower Courts Correctly Denied Petitioners' Motion to Transfer This Case 34

CONCLUSION 45

TABLE OF AUTHORITIES

Cases **Pages**

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 27

Allegaert v. Chemical Bank, 432 F.Supp. 685 (E.D.N.Y. 1977) 35

Allen v. Flournoy, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972) 30,31

Altman v. Deramus, 342 F.Supp. 72 (S.D.N.Y. 1972) 43

Arizona v. New Mexico, 425 U.S. 794 (1976) 21-23

Atlantic Ins. Co. v. Fulfs, 417 S.W.2d 302 (Tex.Civ.App.—Fort Worth 1967, writ ref'd n.r.e.) 26

Blackstone v. Miller, 188 U.S. 189 (1903) 19

Boeing Airplane Co. v. Perry, 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964) 29

Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F.Supp. 485 (D.Md. 1962) 15

Bush v. Carpenter Brothers, Inc., 447 F.2d 707 (5th Cir. 1971) 32

California v. Texas, No. 88, Original 21,23,39

California v. Texas, order no. A-433, 434 U.S. 993 (1977) 1

California v. Texas, 437 U.S 601 (1978) 1,6,8,11,12,18,19,20

Carnes v. Meador, 533 S.W.2d 365 (Tex.Civ.App.—Dallas 1975, writ ref'd n.r.e.) 26

Chicago, R.I. & P.Ry. v. Schendel, 270 U.S. 611 (1926) 26,29

Chicago, R.I. & P.Ry. v. Igoe, 212 F.2d 378 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955) 41

Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823) 29

Cohn v. Cohn, 20 Cal. 2d 65, 123 P.2d 833 (1942) 33

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 19

Pages

Commonwealth Edison Co. v. Montana, __U.S.__, 101 S.Ct. 2946 (1981) 18

Connally v. Georgia, 429 U.S. 245 (1977) 39,40

Cory v. Walsh, 72 Cal. App. 3d 895, 140 Cal. Rptr. 462 (1977) 33

Curry v. McCanless, 307 U.S. 357 (1939) 19

Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967) 9,42

Dugan v. Ohio, 277 U.S. 61 (1928) 40

Edelman v. Jordan, 415 U.S. 651 (1974) 11,12

Estate of Johnson v. Bellville Hospital, 56 F.R.D. 380 (S.D.Tex. 1972) 29

Expert Electric, Inc. v. Levine, 554 F.2d 1227 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977) 27

Ex parte Young, 209 U.S. 123 (1908) 12,14

Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930) 19

Federated Dept. Stores, Inc. v. Moitie, __U.S.__, 101 S.Ct. 2424 (1981) 35

First Nat'l Bank v. Maine, 284 U.S. 312 (1932) 19

Flintkote Co. v. Allis-Chalmers Corp., 73 F.R.D. 463 (S.D.N.Y. 1977) 42

Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n, __U.S.__, 101 S.Ct. 2008 (1981) . 11

Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459 (1945) 12

Glover v. Landes, 530 S.W.2d 910 (Tex.Civ.App.— Houston [1st] 1975, writ ref'd n.r.e.) 26

Graves v. Elliott, 307 U.S. 383 (1939) 19

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 12

Pages

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 10,16,42

Harry Rich Corp. v. Curtiss-Wright Corp., 308 F.Supp 1114 (S.D.N.Y. 1969) 35

Heckman v. United States, 224 U.S.413 (1912) 26-28

Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980) 17

Hoffman v. Blaski, 363 U.S. 335 (1960) 36

Humane Society of Austin & Travis County v. Austin Nat'l Bank, 531 S.W.2d 574 (Tex. 1975) 26

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 21-23

In re Estate of Holt, 61 Cal. App. 464, 215 P. 124 (1923) 33

In re Estate of Rossi, 169 Cal. 148, 146 P. 430 (1915) 33

In re Estate of Turino, 8 Cal. App. 3d 642, 87 Cal. Rptr. 581 (1970) 26

In re Pearson's Estate, 90 Cal. App. 2d 436, 203 P.2d 52 (1949) 33

In re Trowbridge's Estate, 266 N.Y. 283, 194 N.E. 756 (1935) 23

Jett v. Zink, 362 F.2d 723 (5th Cir. 1966) 32

Johnson v. Alma Investment Co., 47 Cal. App.3d 155, 120 Cal. Rptr. 503 (1975) 30

Jones v. Walt Disney World Co., 409 F.Supp. 526 (W.D.N.Y. 1976) 38

Jordan v. Weaver, 472 F.2d 985 (1973) 11

Kelso v. Sargeant, 11 Cal. App. 2d 170, 54 P.2d 26 (1936) 33

Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946) 11

Kerrison v. Stewart, 93 U.S. 155 (1876) 27

Kersh Lake Drainage District v. Johnson, 309 U.S. 485 (1940) 26

Pages

Kisko v. Penn Central Transportation Co.,
408 F.Supp. 984 (M.D. Penn. 1976) 36

Leith v. The Rocroi, 203 F.Supp. 48 (S.D. Tex. 1962) 35

Lennefelt v. Cranston, 231 Cal. App. 2d 171,
41 Cal. Rptr. 598 (1964) 31

Leroy v. Great Western United Corp., 433 U.S. 173 (1979) 9,16

*Los Angeles Memorial Coliseum Comm'n v.
National Football League*, 89 F.R.D. 497
(C.D. Cal. 1981) 35,40,41,43

Lummis v. White, 491 F.Supp. 5 (W.D. Tex. 1979) 2

Lummis v. White, 629 F.2d 397 (5th Cir. 1980) 2,13,15

McCrocklin v. Fowler, 285 F.Supp. 41 (E.D. Wis. 1968),
aff'd, 411 F.2d 580 (7th Cir. 1969) 29

McElroy v. Security Nat'l Bank, 215 F.Supp. 775
(D.Kan. 1963) 29

Markham v. Allen, 326 U.S. 490 (1946) 18

Maryland v. Louisiana, __U.S.__, 101 S.Ct. 2114 (1981) 20-23

Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931) 29,32

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 19

Milwaukee County v. White Co., 296 U.S. 268 (1935) 19

Mobil Oil Corp. v. W.R. Grace & Co.,
334 F.Supp. 117 (S.D. Tex. 1971) 43

Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824) 17

Montana v. United States, 440 U.S. 147 (1979) 27

Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980) 31

Northern Acceptance Trust 1065 v. Gray,
423 F.2d 653 (9th Cir.), *cert. denied*, 398 U.S. 939 (1970) 43

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 20

Olberding v. Illinois Central R.R., 346 U.S. 338 (1953) 35

Pages

Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) 29

Pan Am. Fire & Cas. Co. v. Revere, 188 F.Supp. 474 (E.D.La. 1960) 15

Patterson v. Louisville & Nashville R.R., 182 F.Supp. 95 (S.D. Ind. 1960) 42

Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978) 28

Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894) 14

Rosewell v. LaSalle Nat'l Bank, __U.S.__, 101 S.Ct. 1221 (1981) 18

Saminsky v. Occidental Petroleum Corp., 373 F.Supp. 257 (S.D.N.Y. 1974) 43

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 28

Shaw v. Railroad Co., 100 U.S. 605 (1879) 27

Shields v. Barrow, 58 U.S. (27 How.) 130 (1854) 27

Sinclair Oil Corp. v. Union Oil Co. of California, 305 F.Supp. 903 (S.D.N.Y. 1969) 38

Smith v. Sperling, 354 U.S. 91 (1957) 17

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 27,28

State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) 15

State Tax Comm'n of Utah v. Aldrich, 316 U.S. 174 (1942) 19

Sutton v. English, 246 U.S. 199 (1918) 18

Texas v. Florida, 306 U.S. 398 (1939) 9,18,20,21,24,39

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145 (10th Cir. 1967) 38

Toler v. Travis County Child Welfare Unit, 520 S.W.2d 834 (Tex.Civ.App.—Austin 1975, no writ) 22

Tumey v. Ohio, 273 U.S. 510 (1927) 39,40

Pages

United States v. Lamb, 575 F.2d 1310 (10th Cir.), *cert. denied*, 439 U.S. 854 (1978) 41

United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) 41

United States v. Raddatz, 447 U.S. 667 (1980) 20

United States v. Sorcey, 515 F.2d 899 (7th Cir.), *cert. denied*, 327 U.S. 794 (1945) 41

Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 389 F.Supp. 568 (E.D. Va. 1975) 40

Westinghouse Electric Corp. v. County of Los Angeles, 42 Cal. App. 3d 32, 116 Cal. Rptr. 742 (1974) 30

Wigand v. Flo-Tek Inc., 609 F.2d 1028 (2d Cir. 1980) 17

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) 39

Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 6,11,12,19

York v. State, 73 Tex. 651, 11 S.W. 869 (1889) 22

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. X 8,9

U.S. Const. amend. XI 2,6,8-14,18,24,38,42,45

Cal. Admin. Code Tit. 19, p. 660.4 33

Cal. Prob. Code §226 32

Cal. Prob. Code §420 37

Cal. Prob. Code §571 26

Calif. Rev. & Tax. Code §14101 33

Calif. Rev. & Tax. Code §14104 (1979) 17

Calif. Rev. & Tax. Code §14121 31,33

Calif. Rev. & Tax. Code §14127 31

Calif. Rev. & Tax. Code §14143 33

Calif. Rev. & Tax. Code §14795 (1979) 17

Pages

Tex. Prob. Code §37 26
Tex. Prob. Code §233 26
26 U.S.C. §2001 (1976) 20
26 U.S.C. §2011 (1976) 20
28 U.S.C. §1251(a) 2,6,13,14,21,23,29
28 U.S.C. §1332 14
28 U.S.C. §1335 6-10,13-17,24,39
28 U.S.C. §1341 9,18
28 U.S.C. §1397 7,9,15,24,25,35,43
28 U.S.C. §1404(a) 7,9,16,24,25,34-36,38,42,44
28 U.S.C. §1872 20

Fed. R. Civ. P. 15 36
Fed. R. Civ. P. 17(a) 29,31
Tex. R. Civ. P. 75b. 23

OTHER AUTHORITIES

Advisory Committee Note, Rule 17(a) 29
California Controller's Inheritance Tax Regulation 13409(b) 33
CCH Inheritance, Estate and Gift Taxation Reporter, State Vol. 1, ¶15,318 33
F. James, *Civil Procedure*, (1965) 28
Moore's Federal Practice 27-29,43
Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964) 27
Vestal, *Res Judicata/Preclusion: Expansion*, 47 So. Cal. L. Rev. 357 (1974) 27
C. Wright & A. Miller, *Federal Practice & Procedure* 15,16,32,39
C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* 32

STATEMENT OF THE CASE

The seeds of this lawsuit sprouted from the grave of an abortive original action filed by the State of California on November 11, 1977. *California v. Texas,* 437 U.S. 601 (1978). That original action, in turn, had evolved from lengthy probate court litigation in Houston over the domicile of Howard Hughes. Following sixteen months of intensive discovery and trial preparation in the Texas case—during which time Petitioners gave no indication that they intended to press any domicile claim with respect to Hughes—California emerged on the eve of the Houston trial and attempted to barter access to this Court's original jurisdiction in return for a chance to collect most of its death taxes regardless of the merits of a California domicile claim.[1]

This Court properly refused to enjoin the Texas domicile trial. *California v. Texas,* order no. A-433, 434 U.S. 993 (Dec. 12, 1977). That trial lasted eleven weeks and resulted in a jury verdict, and, subsequently, a final judgment, that Hughes died domiciled in Texas. Respondent Lummis and one potential legatee appealed from that judgment.

California's motion for leave to file an original action was unanimously denied on June 22, 1978. *California v. Texas,* 437 U.S. 601 (1978). In response to the concurring opinions accompanying that decision, the Hughes estate (hereinafter "the Estate") filed this interpleader action in the United States District Court for the Western District of Texas, Austin division, on July 14, 1978. (J.A. 1). The District Court promptly restrained all parties from proceeding with Hughes domicile litigation in any other

1. As the Court may recall, the primary agreement between California and the Hughes estate was contingent upon this Court's exercise of original jurisdiction over California's suit against Texas. It provided that California would receive 2% of the federal net taxable estate if the Court accepted jurisdiction and determined that Hughes was a domiciliary of Texas at his death. California was to receive 18% of the federal net taxable estate if this Court determined that Hughes was domiciled anywhere other than Texas. A supplemental letter agreement also obligated the Hughes estate to furnish California with copies of pleadings, depositions and documentary evidence relevant to domicile, along with providing its attorneys for consultation to aid California in its suit against Texas. The texts of these agreements were set forth as appendices "E" and "F" to Texas' brief in opposition filed in *California v. Texas, supra.*

forum. On August 3, 1978, the Texas taxing officials, respondents White and Bullock, filed a motion to dismiss, asserting primarily that the action was barred by the Eleventh Amendment and the doctrine of collateral estoppel. (J.A. 14).

In the fall of 1978, Petitioners, who had obtained an extension of time to respond to the original complaint, persuaded the District Court that issues of joinder and venue should be resolved prior to a determination of subject matter jurisdiction. Petitioners then filed two companion motions. (J.A. 21, 22). The first they accurately describe as a motion to join some twenty-two alleged heirs as defendants. (Pet. for Cert. 4). The second is incorrectly portrayed as a lofty, magnanimous motion brought solely to transfer the action to a "neutral forum," the District of Colorado. (*Id.*). Petitioners also alternatively sought in that motion to transfer the case to Los Angeles, California. (J.A. 23). In November of 1978, the District Court denied Petitioners' motions to add parties and change venue. (Pet. App. D & E).

Unable to effect a transfer of the case, Petitioners filed a motion to dismiss in February of 1979, based upon grounds similar to those asserted earlier by respondents White and Bullock. The District Court granted the motions to dismiss. ***Lummis v. White,*** 491 F.Supp. 5 (W.D. Tex. 1979). (Pet. App. G). Respondent Lummis appealed, and Petitioners cross-appealed, seeking a transfer of the case to a federal district court in Colorado. The Court of Appeals reversed the finding of no jurisdiction but affirmed the denial of Petitioners' motions to add parties and change venue. ***Lummis v. White,*** 629 F.2d 397 (5th Cir. 1980). (Pet. App. A).

Having again failed in their attempt to transfer the case to another district court, Petitioners filed with this Court a petition for certiorari and a second motion for leave to file an original action against Texas. Now preferring to proceed in this Court only, Petitioners have made certain changes to help achieve that goal. First, they alter their earlier position and argue for the first time that no district court has jurisdiction over this action because 28 U.S.C. §1251(a) vests original jurisdiction exclusively with this Court. ***See*** Petitioners' Brief (hereinafter "Pet. Br.") at

17-26. Second, after this case was submitted on oral argument to the Court of Appeals, California revised its inheritance tax laws in a manner which Petitioners now assert undercuts the jurisdictional basis of an interpleader action in district court. (Pet. Br. at 32-36). And, finally, Petitioners manipulate the style of the case —which had been "Lummis v. White" in the lower courts, and here logically should be "Cory v. Lummis"—to emphasize in a very cosmetic fashion their position that this is in actuality a suit between states.

This action arises as a result of the death of Howard Robard Hughes, Jr., on April 5, 1976, and the efforts of Petitioners and respondents White and Bullock to impose domicile-based death taxes on the Hughes estate.

Mr. Hughes was born in Houston, Texas, on December 24, 1905. His father was an inventor and manufacturer. His mother, a member of a prominent family that settled in Texas in 1856, died in 1922. When his father died in 1924, a Houston court removed the disability of minority from the nineteen-year-old Hughes and allowed him to take control of Hughes Tool Company, a Houston corporation that manufactured oil well equipment.

In June of 1925, Mr. Hughes married Ella Botts Rice, a member of the distinguished Houston family for whom Rice University is named. Mr. Hughes developed interests in filmmaking and aviation and began making trips to Los Angeles, California to pursue those avocations. By 1929, when Mrs. Hughes obtained a divorce in Houston, Mr. Hughes had begun to spend a considerable amount of his time in southern California. For the next two decades he traveled extensively, spending much of his time making cross-country test flights. While Mr. Hughes based his aviation and movie activities in California, he spent much of his time traveling during this period, predominantly on the East Coast.

In 1940 Mr. Hughes registered with a Houston draft board and was given a deferment to continue his airplane and armament manufacturing in Texas and California during World War II. In sworn testimony in 1947 before a Senate committee investigating claims of profiteering on wartime contracts, he gave his residence as Houston, Texas and stated that his company was headquartered

there. He expressed disdain at the attempt to impugn his integrity, stating, "I believe I have the reputation in that respect which most Texans consider important. That is to say, if I may use a corny phrase, I believe people consider my word to be my bond." Testifying in a state court civil trial in California in 1952, Mr. Hughes stated that although he was then staying at the Beverly Hills Hotel, his domicile was Houston, Texas.

From 1950 until 1966 Mr. Hughes spent most of his time in California, although he was also in Nevada, Florida, Canada and the Bahamas for significant periods of time. The majority of his time in California during this period was spent at the Beverly Hills Hotel, where he rented rooms on a day-to-day basis.

From 1966 until his death, Mr. Hughes stayed in hotels in Boston, Las Vegas, the Bahamas, Nicaragua, Vancouver, London and Acapulco. Throughout his travels—indeed, throughout his entire life—Hughes listed Houston, Texas as his residence on his passports, on all of his federal income tax returns, and on all state income tax returns he was required to file. On April 5, 1976, Mr. Hughes was placed on a private jet in Acapulco, Mexico, bound for Methodist Hospital in Houston, Texas. He died en route shortly after the plane passed over Brownsville, Texas. Mr. Hughes was buried next to his parents in Houston's Glenwood Cemetery. He had maintained a family burial plot since his father's death in 1924 but did not finally purchase a perpetuity deed thereon until 1973, soon after he had undergone major surgery in London for a hip injury that was to keep him bedridden for the remaining three years of his life.

On April 14, 1976, probate proceedings were begun in California, Texas and Nevada. A purported will of Mr. Hughes, dated March 19, 1968 (the "Mormon" will), containing substantial bequests to several charitable organizations (including the University of Texas and Rice University), surfaced in late April of 1976 and was offered for probate in California, Nevada and Texas. Howard Hughes Medical Institute ("HHMI"), a non-profit corporation, appeared and asserted that Mr. Hughes had executed and never revoked a valid will (the "lost" will) leaving his entire estate to HHMI.

The Texas Attorney General entered an appearance for the State of Texas in the Houston probate proceeding on June 10, 1976, asking the Court to determine the validity of any purported will of Mr. Hughes and to declare Texas his domicile at the time of death. After extensive discovery a trial of the issues of domicile and the validity of the Mormon will was held in Houston beginning November 14, 1977. After three months of trial, including the testimony of some seventy-three witnesses and the introduction of 1,619 exhibits, the jury found that Mr. Hughes was domiciled in Texas at death and that the Mormon will was invalid. Judgment to that effect was subsequently entered. (J.A. 139).

Final judgment has also been rendered in Nevada that the Mormon will is invalid. Final judgment has been rendered against HHMI in Nevada on the lost will; the Houston probate court recently entered a summary judgment against HHMI on the lost will, which judgment has been appealed.

Proceedings to determine heirship are continuing in the Houston probate court. In separate proceedings undertaken between July and September, 1981, that Court has entered summary judgment against three women who contend they were legally married to Hughes at the time of his death; all three have appealed. In a non-jury trial, the Court has determined the maternal heirs of Hughes, and in a subsequent two-week jury trial, a jury verdict has been received as to the paternal heirs. Formal judgments have not as yet been entered, and in all likelihood appeals will follow.

Efforts to valuate the Hughes estate are also being made by taxing officials. The Internal Revenue Service has valued the gross estate at $468,085,903. The Hughes estate is contesting this valuation in United States Tax Court. The California inheritance tax referee has valued the gross estate at $1,106,345,561. Although the Texas valuation has not been released to the public, it more closely approximates the Internal Revenue Service valuation than the California valuation.

On July 21, 1981, Petitioners filed a "Motion To Temporarily Remove Original Exhibits" with Harris County Probate Court No. 2 in Cause No. 139,362 entitled The Estate of Howard R. Hughes, Jr., Deceased, the ongoing cause of action in which all of the

[This Page Intentionally Left Blank]

aforementioned domicile and heirship litigation in Texas has ensued. Petitioners' motion was granted by the Honorable Pat Gregory, judge of said court. Respondents White and Bullock have filed in said court a response to petitioners Cory's and Alvord's appearance, and have joined issue with them as to the domicile of decedent, Howard R. Hughes, Jr. in the Houston Probate Court.

SUMMARY OF ARGUMENT

The death of Howard Hughes has spawned two bilateral disputes about his estate's liability for state death taxes: one between the Estate and the taxing officials of California, and the other between the Estate and the taxing officials of Texas. In an effort to avoid the possibility of double state death taxation, the Texas administrator of the Estate filed this action under 28 U.S.C. §1335 in federal district court in Austin, Texas, interpleading those state taxing officials and seeking a unitary determination of Hughes' domicile at the time of his death. This case presents for review the Fifth Circuit's decision that this statutory interpleader action is jurisdictionally sound and that the denial of a motion to transfer the case to Colorado was not an abuse of discretion.

The obvious impediment to the exercise of jurisdiction under section 1335 in this case is *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937), which holds that the Eleventh Amendment bars such an action. However, serious doubt has been raised about the present vitality of *Worcester County,* and only this Court can resolve that question. *See California v. Texas,* 437 U.S. 601 (1978). If the Eleventh Amendment still bars this action, these separate controversies which the Estate has concerning its liability for state death taxes should be remitted to state courts, which have traditionally resolved these disputes. These bilateral disputes involving the Estate do not comprise a suit between states, no controversy now exists between the State of California and the State of Texas over this matter, and original jurisdiction in this Court is therefore not present.

If, on the other hand, the Eleventh Amendment is no longer a bar, statutory interpleader jurisdiction is present in this case. 28 U.S.C. §1251(a) does not preclude this action because it is simply not one between two states. And the minimal diversity require-

ment of section 1335 is satisfied by the diverse citizenships of plaintiff Lummis and defendant Alvord, the County Treasurer of Los Angeles.

Petitioners requested the district court to transfer this case either to Denver or Los Angeles. Because such a transfer can only be made to a district where the action "might have been brought" originally (28 U.S.C. §1404(a)), and because no claimant resided in Colorado to support venue there (28 U.S.C. §1397), Petitioners also moved to add twenty-two potential heirs of Hughes as parties. The district court correctly determined that transfer to Los Angeles was not justified by the convenience of the litigants and witnesses, and that the transparent attempt to manipulate venue through the artificial device of joining the heirs was inappropriate. The heirs clearly should not be joined because they have no role to play in this litigation. Their interests are fully represented by the administrators of the Estate, and the heirs will therefore be bound by any domicile determination without being made parties.

Finally, even if the Court should order joinder of the heirs, this case should not be transferred to Colorado. Such a transfer would mean incredible inconvenience to all of the litigants and virtually all of the scores of potential witnesses. Moreover, such a transfer would astronomically increase the litigation expenses for all parties. Petitioners' unfounded fears of local prejudice in Austin, Texas cannot override the determinations by the District Court and Court of Appeals that Austin is the most convenient and appropriate forum for the litigation. That determination does not constitute an abuse of discretion.

ARGUMENT

Introduction

When California unsuccessfully sought to invoke this Court's original jurisdiction in 1978, it did so announcing that its proposed action against Texas was motivated in large part by its "own sense of fairness" regarding the situation confronting the Hughes

estate.[2] Revelation of the covert contractual link between California and the Estate—essentially an attempt to barter access to this Court's original jurisdiction—was an early clue that California's interpretation of "fairness" might be somewhat unique. Now, with four members of this Court suggesting that 28 U.S.C. §1335 provides the Estate with a remedy for the perceived unfairness of double state death taxation and Petitioners with their desired unitary adjudication of domicile, Petitioners oppose that interpleader remedy primarily because its venue is "unfair" and "unseemly". (Pet. Br. at 6, 10, 11, 16 & 45). While Petitioners' sense of fairness has apparently been tempered by a healthy dose of self-interest, it is as misdirected now as it was in 1978. For Petitioners now attempt to convert their dissatisfaction with venue in this case into jurisdictional principles which would eliminate the interpleader remedy for similarly situated estates in most future cases.

While the Texas taxing officials certainly have not warmly embraced the proposed interpleader remedy[3], if this Court determines

---

2. At oral argument on the motion for leave to file complaint, counsel for California stated:

> MR. FALK: "Finally, another factor that I want to mention just briefly that brought us here and I think is important for this Court's exercise of jurisdiction was our own sense of fairness. To have proceeded independently to litigate the tax claim in our own courts, as Texas sought to do, even if we could do so, *Western Union* notwithstanding, simply did not comport with our notion of a fair and appropriate process." (Tr. of oral argument in *California v. Texas*, No. 76, original, March 29, 1978 at p. 19)

3. From the outset of this litigation, the taxing officials of the State of Texas have believed and argued that *no* federal court has jurisdiction to relitigate the Texas state court determination that Howard Hughes was domiciled in Texas for purposes of the Texas inheritance tax. That position has been grounded primarily upon the Eleventh Amendment and the doctrine of collateral estoppel, and secondarily upon concepts of federalism embodied, *inter alia*, in the Tenth

(footnote continued on following page)

that the federal system itself should provide a solution to multiple state death taxation, it is submitted that an action under section 1335 is the only available remedy—and certainly the most expeditious and reasonable one. For either *Texas v. Florida,* 306 U.S. 398 (1939), was wrongly decided and an original action in this Court is completely unavailable, or *Texas v. Florida* was correctly decided and provides relief in so precious few cases that it is no remedy at all. Therefore, if the Court decides that the Eleventh Amendment bars actions such as this under section 1335, these domicile disputes should be resolved by the state courts, which have traditionally handled issues of state tax law.

If this interpleader action can proceed consistently with the Eleventh Amendment, the fact that venue is laid in a state asserted to be the decedent's domicile is neither improper nor jurisdictionally debilitating. In this case, venue options are limited to districts located within California and Texas. 28 U.S.C. §1397. But even if choice of venue were unrestricted, it would be a grievous error to transfer this litigation to Colorado.

Several factors commend trying a case such as this in one of the claimant states. Many of these reasons are set forth in 28 U.S.C. §1404(a) and in the judicial interpretation of that statute. As this Court has noted, venue "is primarily a matter of choosing a convenient forum." *Leroy v. Great Western United Corp.,* 443 U.S. 173, 180 (1979); *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen,* 387 U.S. 556, 560 (1967). In this case, the District Court considered *all* of the factors under section 1404(a), weighed all evidence submitted pertaining to each of those factors, and appropriately concluded that this litigation was better venued in Austin than in Los Angeles. (Pet. App. F). In light of that ruling—which Petitioners did not appeal— section 1404(a) cannot possibly countenance the proposed transfer to Colorado, where all parties, witnesses, and

---

(footnote continued from previous page)

Amendment, the Tax Injunction Act (28 U.S.C. §1341), and the abstention doctrines. These various jurisdictional objections all implicate, to some extent, the same concerns of federalism bound up in the Eleventh Amendment issue which this Court now faces.

attorneys will be greatly inconvenienced, all parties put to an enormous increase in litigation expense, and the courts and populace of Denver saddled with the many burdens and costs inherent in the lengthy trial of this case. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

Petitioners have consistently lashed out at any argument opposing transfer on the grounds of inconvenience and expense as disingenuous and view opposition to a transfer of the case from Austin to Denver as buttressing their position that Austin venue is improper—*i.e.*, since the Texas officials want to try the case in Austin, Petitioners' fears of local prejudice must be valid. *See* Petitioners' Reply Br. on Cert. at 8. Respondents White and Bullock know of no way to convince the Court that their true concerns are the convenience and availability of the anticipated witnesses, parties and counsel; minimizing further expenditures on this case, which, because of the prior state court trial, has already cost Texas a huge sum; and a reluctance to impose the excessive expenditures of time and money on the courts and populace of Denver, which has absolutely no connection with this controversy. No more can be done to demonstrate the sincerity with which Respondents White and Bullock believe that local prejudice—either in Texas or in California—will not be a significant factor at any trial of this case than this: if the Court should decide that the issue of Hughes' domicile should be tried in a federal district court under section 1335, and if the Court should feel for any reason that venue in Austin, Texas is improper and must be transferred, the Texas taxing officials would ask the Court to send this case to Los Angeles rather than to Denver. For while Los Angeles is clearly a less convenient forum for this litigation than Austin, Denver is, by far, the least appropriate place to try this case. And Respondents White and Bullock firmly believe that the trial judge—whether sitting in Austin or Los Angeles—can protect the litigants from any possible danger of local bias or prejudice.

I. The Resolution of the Issues Presented Hinges on the Eleventh Amendment Question

A unanimous, unreversed decision of this Court holds that an interpleader action such as this one is barred by the Eleventh

Amendment. ***Worcester County Trust Co. v. Riley,*** 302 U.S. 292 (1937) (hereinafter "***Worcester County***"). Four Justices of this Court, however, have suggested that the holding of ***Worcester County*** has been undercut by ***Edelman v. Jordan,*** 415 U.S. 651 (1974) (hereinafter "***Edelman***"). ***California v. Texas,*** 437 U.S. 601 (1978) (Brennan, J., concurring), 608 n. 10 (Stewart, J., concurring), 615 (Powell, J., concurring). This Eleventh Amendment issue appears even further clouded because several members of the Court, for various reasons that may or may not affect this case, feel that ***Edelman*** itself was wrongly decided. ***See Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n,*** ____U.S.____, 101 S.Ct. 2008 (1981). All that is clear is that Eleventh Amendment interpretation—already cluttered with more than its share of judicial debris during the 183 years since its ratification—is still unsettled.

The Texas taxing officials argued below and still believe that the holding of ***Worcester County*** remains good law, completely unscathed by ***Edelman. Edelman*** involved a class action suit brought against Illinois officials administering the federal-state programs of Aid to the Aged, Blind and Disabled in violation of numerous federal regulations. The district court granted a permanent injunction requiring compliance with those regulations and further ordered the Illinois officials to pay benefits wrongly withheld during the preceding three years. 415 U.S. at 656. The Seventh Circuit affirmed that order, rejecting the officials' argument that the Eleventh Amendment prohibited the order requiring retroactive benefit payments. ***Jordan v. Weaver,*** 472 F.2d 985, 989-995 (1973). This Court reversed, holding that the Eleventh Amendment did bar such retroactive monetary relief against the State of Illinois. 415 U.S. at 678. The Court concluded that unconsented suits brought in federal courts to recover money from a State were incompatible with the purpose and past interpretation of the Eleventh Amendment. 415 U.S. at 660-663. The line between retroactive relief from state treasuries and prospective injunctive relief against state officials was thus drawn by the Court in ***Edelman*** simply by connecting the dots of its past decisions. 415 U.S. at 663; ***see Kennecott Copper Corp. v.***

State Tax Comm'n, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

In hewing that line, the Court rejected the theory— espoused by the Seventh Circuit (472 F.2d at 990 n. 10, 990-992)—that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), can be used to permit retroactive relief as well as injunctive relief against future conduct. 415 U.S. at 666. By doing so, the Court closed a gap in Eleventh Amendment law and provided the States with *additional* protection against suits in federal court. Nothing in the analysis or holding of *Edelman* suggests that the Eleventh Amendment is now so withered that it allows *all* suits which seek only prospective relief from state officials.

The threshold inquiry under *Ex parte Young—i.e.*, whether the alleged actions of the state officials conflict with paramount federal law—must still be made before those officials can be stripped of their official character and Eleventh Amendment immunity, thereby permitting prospective injunctive relief against them. It is that very inquiry which the unanimous court in *Worcester County* resolved in favor of the state taxing officials. Nothing has occurred since 1937 to undermine the determination in *Worcester County* that the actions of those officials did not contravene federal or state law, and were therefore the actions of the sovereign States. *See California v. Texas, supra*, 437 U.S. at 612 and n. 13 (Stewart, J., concurring). The analysis and holding of *Edelman* thus appear to leave the Eleventh Amendment holding of *Worcester County* completely untouched.

The continuing vitality of *Worcester County* will, of course, hinge on this Court's view of the present development and role of the Eleventh Amendment. While such a significant constitutional decision will certainly not be founded on its results in this particular case, it is helpful to focus on the effect of the Eleventh Amendment decision on the options facing the Court in this case.

A. If This Action Is Not Barred by the Eleventh Amendment, Interpleader Jurisdiction Is Satisfied.

If this Court should determine that the Eleventh Amendment no longer precludes an action such as this, the Fifth Circuit's decision

that this case satisfies the jurisdictional prerequisites of 28 U.S.C. §1335 should be affirmed. The Fifth Circuit based statutory interpleader jurisdiction upon the diverse citizenships of plaintiff Lummis and defendant Alvord, the County Treasurer of the County of Los Angeles. ***Lummis v. White,*** 629 F.2d 397, 402-403 (1980). Petitioners argue that the citizenship of neither Lummis nor Alvord may be used to fulfill the diversity requirement of section 1335 and that district court jurisdiction is barred by 28 U.S.C. §1251(a) because this is a controversy "between two ...states" within this Court's exclusive jurisdiction. All of these arguments are quite wide of the mark, and statutory interpleader jurisdiction is present.

1. 28 U.S.C. §1251(a) Is Irrelevant to Jurisdiction Under 28 U.S.C. §1335.

If the Eleventh Amendment does not bar a federal district court from entertaining this interpleader action, the provisions of 28 U.S.C. §1251(a) would certainly not do so. For if this case can proceed consistently with the Eleventh Amendment, it will have already been determined that this is not a suit against either the State of California or the State of Texas. It surely cannot then be considered a suit ***between*** the two states if it is not a suit against either state. For this reason, section 1251(a) adds nothing to the Court's determination of whether this action can be tried in a federal district court.

It is interesting to note that no party to this litigation ever asserted in the lower courts that no federal district court can entertain this case because jurisdiction rests exclusively with this Court. In fact, Petitioners, in an effort to induce a transfer to a federal district court in Colorado, argued below that such a transfer would cure all jurisdictional defects. The District Court and Court of Appeals would be amazed and boggled to learn that Petitioners now assert that no district court, regardless of location, can exercise jurisdiction over this case.[4] Petitioners downplay this stagger-

4. For example, in oral argument before the Fifth Circuit Petitioners' counsel stated as follows:

MR. FALK: No, we don't want to play any procedural

(footnote continued on following page)

ing change in position, selflessly attributing it to oversight by counsel, and argue that it is irrelevant because jurisdictional issues may be raised at any time. (Pet. Reply Br. on Cert. at 1 n. 1). This flip-flop is significant, however, for it underscores the invalidity of Petitioners' argument under section 1251(a). Counsel failed to see only what was never there. Petitioners have always realized that section 1251(a) is ultimately irrelevant to statutory interpleader jurisdiction.

2. The Diversity Requirement of 28 U.S.C. §1335 Is Met.

Petitioners argue that the citizenships of the defendant state taxing officials cannot be used to satisfy the diversity requirement of section 1335 because the states themselves are the real parties in interest, and states are not "citizens of a state" for diversity purposes.[5] ***Postal Telegraph Cable Co. v. Alabama,*** 155 U.S. 482 (1894). (Pet. Br. at 27). The Fifth Circuit did not address this contention, for it found the requisite minimal diversity in the citizenships of plaintiff Lummis and defendant Alvord, the County

---

(footnote continued from previous page)

> game. And I understand why the result in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act. (Tr. of March 31, 1980, 5th Cir. Arg. at p. 19)

Such representations are hardly consistent with Petitioners' current position that 28 U.S.C. §1251(a) precludes this action from being heard by any court save this one.

5. If this Court holds that the Eleventh Amendment does not bar this action, it may also be called upon to decide for the first time whether the doctrine of ***Ex parte Young, supra,*** not only strips state officials of their official character for purposes of the Eleventh Amendment but also renders them individual citizens for purposes of diversity analysis under 28 U.S.C. §1332 (and therefore under §1335 as well). If this question is answered affirmatively, diverse citizenships will abound in this case.

Treasurer of the County of Los Angeles. While Petitioners argue that the citizenship of neither of these gentlemen can be used to satisfy section 1335, in fact the citizenships of these men alone are sufficient to meet the requirements of the interpleader statute.

First, the Court of Appeals ruled that the citizenship of plaintiff Lummis can be considered because, as an administrator of the Hughes estate, he is an interested stakeholder and therefore a claimant. *Lummis v. White, supra,* 629 F.2d at 403. That ruling comports with the overwhelming weight of the case law and commentary, which permit and urge the broadest possible application of interpleader. *See, e.g., Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D.Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477 n. 8 (E.D.La. 1960); 7 C. Wright and A. Miller, *Federal Practice & Procedure,* §1710 at 405-407 (1972); *cf. State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967) (§1335 requires only "minimal diversity").

Unable to cite a single case to support their position, Petitioners instead offer some examples to demonstrate how consideration of an interested stakeholder's citizenship will have an untoward effect on established principles of diversity jurisdiction. (Pet. Br. at 30-31). In the first example, Petitioners posit a simple bilateral dispute between an insurer from one state and a claimant from a second state and contend that the ruling below would provide jurisdiction for such an action under section 1335. Such a case obviously cannot be brought under section 1335 because it is not an interpleader or in the nature of interpleader—a threshold requirement under the statute—for the simple reason that the stakeholder is faced with only a single claim to the stake in his possession. By contrast, in the case at bar, while the citizenships of only Lummis and Alvord were used to satisfy the diversity requirement of section 1335, the additional claims of the state taxing officials were viewed by the Court of Appeals as creating the requisite situation in the nature of interpleader.

Petitioners' next example is no more instructive than the first. It suggests that an interested stakeholder, as a "claimant" under sections 1335 and 1397 (venue), would be able to bring suit in the

place of his own residence, thereby causing unthinkable forum abuse. The specific example is of a Delaware insurer who denies liability to, and then interpleads, a dozen California (or west coast) claimants and forces them to litigate their claims in Delaware, despite the fact that none of those claimants had any prior contacts with Delaware. It is strange for Petitioners to mention this type of potential forum abuse when that is precisely what they seek the Court to do in their motion to transfer this case to Colorado. For no party to this case has any prior contacts with the State of Colorado.

Clearly, the solution to the forum abuse posed by Petitioners' example would be a motion by any of the west coast claimants to transfer the hypothetical case from Delaware to California for the convenience of the witnesses and parties, and to promote the interest of justice. Courts will not permit plaintiffs "an unfettered choice" of districts and will not allow litigation to proceed in a forum with no relation to the case. ***Leroy v. Great Western United Corp., supra,*** 443 U.S. at 185; ***Gulf Oil Co. v. Gilbert, supra,*** 330 U.S. at 508-509. In fact, the obvious merit to such a 1404(a) motion underscores why Petitioners' motion to transfer this case was properly denied.

In sum, Petitioners' contention that the citizenship of an interested stakeholder cannot establish diversity under section 1335 is most clearly laid to rest by the analysis of Professor Wright:

> "Nevertheless, once an interested stakeholder deposits the fund with the court or posts an appropriate bond, he does become a claimant for all practical purposes and his citizenship should be relevant in deciding the jurisdiction question. Moreover, since by hypothesis, the stakeholder's citizenship will be diverse from that of at least one of the claimants, the interpleader has interstate aspects and therefore seems to fall within the class of cases intended to be covered by the statute." (7 C. Wright & A. Miller, ***supra,*** at 407)

The citizenship of plaintiff Lummis can therefore be utilized to fulfill the diversity requirement of section 1335.

Second, Petitioners argue that the citizenship of petitioner Alvord can no longer satisfy the diversity requirement of section 1335 due to changes in California inheritance tax law which took effect after the Fifth Circuit's ruling in this case.[6] It is clear that California's deletion of petitioner Alvord from its tax collection scheme, a unilateral action taken after oral argument before the Fifth Circuit, cannot dissipate previously existing jurisdiction in this case. Few principles have been longer, or more firmly, established than that jurisdiction is determined when the original complaint is filed and that later occurrences are irrelevant. ***Smith v. Sperling,*** 354 U.S. 91 n. 1 (1957). Chief Justice Marshall unequivocally announced the governing rule in 1824:

> "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." (***Mollan v. Torrance,*** 22 U.S. (9 Wheat.) 537, 539 (1824))

That rule is, of course, still followed today. ***See, e.g., Hill v. Rolleri,*** 615 F.2d 886, 889 (9th Cir. 1980); ***Wigand v. Flo-Tek Inc.,*** 609 F.2d 1028, 1032-33 (2d Cir. 1980). Were that not the law, diversity jurisdiction would be purely ephemeral because a defendant—or, on appeal, any litigant dissatisfied with the result below—could always change his domicile to match that of an opposing party and seek dismissal for lack of jurisdiction. For that very reason, California's voluntary revision of its inheritance tax laws after this suit was on appeal cannot affect the evaluation of jurisdiction in this case.

---

6. Under California law in force at the time Hughes died and at the time this interpleader action was filed, Alvord would collect any inheritance tax due from the Hughes estate and retain for the County a percentage of the amount so collected. ***See*** Calif. Rev. & Tax. Code §§14104, 14795 (1979). In the summer of 1980—after oral argument, but months prior to a decision in the Fifth Circuit—California passed a bill, which became effective on January 1, 1981, deleting the role of county treasurers in the tax collection process. (App. to Pet. for Cert. 38f). Petitioners made no effort to apprise the Court of Appeals of this revision prior to its decision and first did so on January 15, 1981—only after their petition for rehearing ***en banc*** had been denied—in an out-of-time petition for rehearing that the Fifth Circuit refused to file.

B. If the Eleventh Amendment Bars This Action, State Courts Should Resolve This Controversy Over State Inheritance Taxes.

Both probate matters and issues of state tax law have traditionally fallen into the domain of the states and their judicial systems. ***See Sutton v. English***, 246 U.S. 199 (1918); ***Markham v. Allen***, 326 U.S. 490 (1946); and ***Commonwealth Edison Co. v. Montana***, ____U.S.____, 101 S.Ct. 2946, 2956 (1981); ***see also*** 28 U.S.C. §1341; ***Rosewell v. LaSalle Nat'l Bank***, ____U.S.____, 101 S.Ct. 1221 (1981). If the Court decides that this matter should not be litigated in a federal district court, state courts should be allowed to resolve these controversies. That is the only alternative to statutory interpleader because this is not a suit between states within this Court's original jurisdiction. Furthermore, this alternative should not be at all unpalatable to the Court or to the Hughes estate, because it is highly unlikely that inconsistent adjudications of domicile would result. The State of California, by and through its taxing officials Cory and Alvord, has recently entered an appearance in the Texas state court probate proceeding which is ongoing with respect to the Hughes estate, and that court now has jurisdiction over the requisite parties to make a unitary, binding determination of domicile.

1. Original Jurisdiction In This Court Is Not Present.

As a conceptual matter, the dispute California and Texas both have with the Hughes estate over its liability for state death taxes is not a suit between states within this Court's original and exclusive jurisdiction. And as a practical matter, even if this suit could be classified as one between states, this case, and others like it, should not be resolved in this Court. Justice Stewart correctly analyzed the premises underlying ***Texas v. Florida, supra***, and accurately demonstrated why that case was wrongly decided and why, therefore, this case is not original action material. ***California v. Texas, supra***, 437 U.S. at 602-615.

Although Petitioners contend they are on a collision course with the State of Texas over the issue of Hughes' domicile for purposes

of death taxation, the paths of the two states' taxing officials in this respect actually run parallel. Each is pursuing an independent death tax claim, and "there is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes estate by proceedings in their own courts." *Id.*, 437 U.S. at 612 n. 13; *see Worcester County, supra*, 302 U.S. at 299. The alleged theoretical inconsistency of the two domicile claims is irrelevant in an original action because the basis of the Texas tax—be it domicile or some other concept[7]—is of absolutely no concern to Petitioners. From Petitioners' standpoint, any Texas tax judgment, regardless of its nature, is indistinguishable from a "judgment upon a simple contract debt...." *Milwaukee County v. White Co.*, 296 U.S. 268, 276 (1935). Therefore, Petitioners' only legitimate interest—the collectibility of a potential tax judgment—is wholly unrelated to domicile.

Thus, Hughes' death has generated two bilateral disputes—one between his estate and Texas, and another between his estate and California—over the issue of domicile and the right to impose death taxes. But the only possible dispute between California and Texas would simply be over money, not domicile or the right to tax. As Justice Stewart noted, that potential dispute—which is more

---

7. It was established long ago that two states can collect death taxes on the transfer of a decedent's intangible property. *Blackstone v. Miller*, 188 U.S. 189 (1903). For a brief period during the 1930's this rule was temporarily reversed. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932). The Court soon recognized its error, however, and returned to the rule of *Blackstone v. Miller, supra*. *See Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939). In 1942 this Court officially overruled *First Nat'l Bank v. Maine, supra*, and held that "there is no constitutional rule of immunity from taxation of intangibles by more than one State." *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 181 (1942). And this Court's view of permissible state taxation is even broader today. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976).

It is therefore clear that Texas, if its statutes so provided, could constitutionally impose death taxes unrelated to domicile on the intangibles of the Hughes estate. Such a tax would impinge upon California's ability to collect any death tax judgment it might eventually obtain in exactly the same fashion as a domicile-based tax.

analogous to a bankruptcy proceeding than to a suit in the nature of interpleader—is unlikely ever to constitute a controversy between states, and surely does not until ***both*** states have tax judgments which the estate cannot pay and thus occupy the "status of unsatisfied creditor." 437 U.S. at 615 n. 15.

In addition to the conceptual problem of categorizing these controversies as a suit between states, several practical reasons counsel against this matter being resolved in this Court. First, because the domicile issue underlies only the bilateral dispute each state has with the estate and not that between the states themselves, an original action under *Texas v. Florida* would inappropriately eliminate the parties' right to have a jury resolve the domicile question. A right to jury trial apparently does not exist in a suit between states tried in this Court. *See, e.g.,* 28 U.S.C. §1872 (right to jury in original actions at law against citizens of the United States). The usual procedure, which was utilized in *Texas v. Florida,* is to appoint a special master, who takes evidence and prepares findings of fact and conclusions of law. While the master's recommendations are advisory only, "this Court regularly acts on the basis of the master's report and exceptions thereto." *United States v. Raddatz,* 447 U.S. 667, 683 n. 11 (1980). *See Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 511 (1971) (Douglas, J., dissenting). With all respect, this Court is simply too ill-equipped, and too overburdened, to function effectively as a trial court for this case. *See Maryland v. Louisiana,* __U.S.__, 101 S.Ct. 2114, 2137 (1981) (Rehnquist, J., dissenting).

Second, an original action under *Texas v. Florida* cannot, as Petitioners suggest, provide a wholesale remedy for future domicile disputes. For even Petitioners now concede that jurisdiction under *Texas v. Florida* cannot be invoked unless the tax claims of the competing states, together with the federal estate tax, exceed 100% of the estate's assets, such that one state's claim will be at least partially uncollectible. (Pet. for Cert. 14 n. 14). Effective shortly after Hughes' death, the maximum rate of the federal estate tax was reduced from 77% to 70%, with no corresponding reduction in the amount of the maximum available credit for state death taxes. *See* 26 U.S.C. §§2001, 2011 (1976). Thus, claims by on-

ly two states—even where one has extremely high maximum death tax rates exceeding the federal credit, such as California's rate of 24%, rather than the customary "pick-up tax" which falls within the federal credit— would not exceed that 100% jurisdictional limit even on the largest of estates. On a "small" estate of two million dollars, which would incur a maximum federal estate tax rate of 45%, it would take competing domicile claims from at least ***eight*** states whose maximum tax rate equals the federal credit of 7.2% in order to provide the necessary predicate for original jurisdiction under *Texas v. Florida*. Clearly, an original action in this Court could provide a remedy for multiple state death taxation, under the guise of resolving a dispute between states, only for the estates of the most wealthy and most mobile members of our society.

Finally, as more fully set forth in Texas' Brief in Opposition to California's Motion for Leave to File Complaint in No. 88, Original, even if this controversy could be categorized as a suit between states, it is not an appropriate one for exercise of this Court's original jurisdiction. As the Court recently noted,

> "[W]e have construed the congressional grant of exclusive jurisdiction under §1251(a) as requiring resort to our obligatory jurisdiction only in 'appropriate cases.' *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *Arizona v. New Mexico*, 425 U.S. 794, 796-797 (1976).
>
> ...
>
> "[T]he issue of appropriateness in an original action between States must be determined on a case-by-case basis."
> (*Maryland v. Louisiana, supra*, 101 S.Ct. at 2125 & 2127)

The magnitude and nature of the injury California alleges it might suffer at the hands of Texas render this case an inappropriate one for an exercise of this Court's original jurisdiction. *See* Texas Brief in Opposition, No. 88, Original at 15-16. More importantly, the recent appearance by Petitioners in the Houston probate court proceeding provides an alternative forum where this dispute can be

settled. *Maryland v. Louisiana, supra; Arizona v. New Mexico, supra; Illinois v. City of Milwaukee, supra.*

2. The Texas Probate Court Has Jurisdiction Over All Parties Necessary To This Action.

There is currently pending in Probate Court No. 2 of Harris County, Texas ("Houston Probate Court") Cause No. 139,362, styled The Estate of Howard R. Hughes, Jr., Deceased. This cause has been pending since April 14, 1976. It is an ongoing proceeding in which the Houston Probate Court is determining all matters incident to the estate of Howard R. Hughes.

On July 21,1981, Petitioners filed a motion in the Houston Probate Court to remove original exhibits from the record. This motion was granted by Judge Pat Gregory, and the original exhibits were withdrawn by Petitioners. By virtue of so invoking the jurisdiction of the Houston Probate Court in the ongoing probate proceedings, petitioners Cory and Alvord have entered a general appearance—albeit inadvertently—in Cause No. 139,362, the Estate of Howard R. Hughes, Jr., Deceased. Of course, whether Petitioners intended to make a general appearance when they filed their motion is irrelevant to the impact of their action. For it has been the law of Texas since at least 1889 that

> "if, in the exercise of his own untrammeled volition, [the defendant] . . . makes an appearance, then he must be held bound thereby, as would be one who could be, but had not been, subjected to the jurisdiction of the courts here by the proper issuance and service of process. The purpose of which appearance is made is unimportant, as is the intention with which it is made, if the act done is one which the statute declares is such as gives to the court jurisdiction to render a personal judgment against the person appearing." *(York v. State,* 73 Tex. 651, 11 S.W. 869 (1889))

York is still the law in Texas today. *Toler v. Travis County Child Welfare Unit,* 520 S.W.2d 834 (Tex. Civ. App.—Austin 1975, no writ). In fact, Petitioners' act of withdrawing original, filed exhibits is one that only a party is permitted to do under Texas

law. Tex. R. Civ. P. 75b. By filing their motion to withdraw original exhibits, instead of simply inspecting or making copies of the exhibits as public records, Petitioners have invoked the jurisdiction of the Houston Probate Court and are now parties to that proceeding.

If this Court should determine that the issues of state tax law presented in this case should not be resolved in a federal district court, the matter can now be safely remitted to state court without fear of inconsistent adjudications of the domicile issue. The Houston Probate Court provides an alternative forum where the issues tendered in this case, and in *California v. Texas*, No. 88, Original, can be resolved. *Maryland v. Louisiana, supra; Arizona v. New Mexico, supra; Illinois v. City of Milwaukee, supra.*

It is uncertain whether Petitioners will argue that 28 U.S.C. §1251(a) precludes state courts, as well as the lower federal courts, from exercising jurisdiction over this matter. For the reasons already set forth in Part IB(1), *supra*, this dispute does not constitute a "controvers[y] between two or more States." Petitioners do suggest this argument by implication, however, by attributing unwarranted significance to a phrase lifted from *Maryland v. Louisiana, supra*, 101 S.Ct. at 2128, (Pet. Br. at 17 n. 21). Petitioners quote that portion of this Court's opinion which states: "a district court action brought by the United States, which necessarily would not include the plaintiff States, would be an inadequate forum in light of the present posture of this case." *Id.* The quoted passage would not appear to be a pronouncement of this Court's exclusive jurisdiction, but rather more likely refers to the perplexing problem of personal jurisdiction the Court had noted earlier: "there exists no procedural mechanism in Louisiana for the plaintiff States or the United States to be made parties to the state refund suit." *Id.*, 101 S.Ct. at 2126 n. 17.

That jurisdictional obstacle is wholly absent here, for Petitioners voluntarily entered an appearance in the proceeding pending in the Houston Probate Court. This unusual situation has occurred at least once before, and the state court exercised jurisdiction and resolved the controversy. *See In re Trowbridge's Estate,*

266 N.Y. 283, 194 N.E. 756 (1935). No less a scholar of this Court's jurisdiction than Justice Frankfurter approved that solution to state death tax disputes and certainly perceived no constitutional or statutory impediment to that exercise of state court jurisdiction. *Texas v. Florida*, 306 U.S. 398, 431 (1935) (opinion of Frankfurter, J.). That solution is available in this case as well.

II. Venue of This Action Is Now Properly Laid

The Federal Interpleader Act includes specific provisions for venue of actions brought pursuant to section 1335. These venue limitations are set forth in 28 U.S.C. §1397, which provides that such actions "may be brought in the judicial district in which one or more of the claimants reside." All parties concede that the Texas taxing officials reside in Austin, Texas and are claimants for inheritance taxes from the Hughes estate. Venue in Austin is indisputably proper under section 1397.

Petitioners, however, assert that the nature of this particular interpleader action makes venue in Austin "unfair" and "unseemly" (Pet. Br. at 6, 10, 11, 16 and 45) and requires transfer of the case to Denver, Colorado. This transfer is necessary, Petitioners claim, in order to provide a "neutral forum" for this litigation.[8] As a necessary predicate to their transfer motion under 28 U.S.C. §1404(a), Petitioners filed a motion to add as defendants some

8. In the District Court, Petitioners also moved, alternatively, that the case be transferred to Los Angeles, California. Having been unable to persuade either the District Court or Court of Appeals to transfer this action, Petitioners now argue here—for the first time—that 28 U.S.C. §1251(a) precludes *any* federal district court from exercising jurisdiction over this case. *See* Parts I(A)(1) & (B)(2), *supra*. And, to buttress their position that an original action in this Court is the only appropriate remedy for this dispute, Petitioners further contend that because the strictures of section 1397 do not permit transfer of this case to Colorado, section 1335 is "the wrong remedy." (Pet. for Cert. 14). While it is indeed true that Colorado is not a potential transferee forum, statutory interpleader is a viable remedy in this case if the Eleventh Amendment does not foreclose it.

twenty-two self-proclaimed heirs[9] of Hughes, one of whom was allegedly a resident of Denver, Colorado.

The district court denied Petitioners' motion to add parties and also denied their motion to transfer the case either to Los Angeles or to Denver. (Pet. App. D, E & F). The Fifth Circuit affirmed those rulings. (Pet. App. A). These decisions were clearly correct.

A. The Lower Courts Correctly Denied Petitioners' Motion to Add Parties.

Unhappy with the Hughes estate's decision to file this action in Austin, Petitioners realized in 1978 that a motion under 28 U.S.C. §1404(a) to transfer the case to California for the convenience of witnesses and parties would inevitably be denied for lack of merit. Since section 1397 restricts venue to districts in which a claimant resides, and because no claimant resided in a district where Petitioners alternatively desired venue, Petitioners filed a motion to add as defendants the twenty-two signatories to an inter-heir settlement agreement. (J.A. 25, 30). As the basis for this motion, Petitioners urge that these heirs must be joined to prevent relitigation of the domicile issue and to protect the heirs, who are personally liable for state inheritance taxes. (Pet. Br. at 40-43). In raising these professed concerns, Petitioners are tilting at self-constructed windmills fabricated solely for the unsubtle purpose of attempting to enlarge the number of potential transferee forums for a change of venue. This transparent attempt at forum manipulation fails because Petitioners' alleged fears of relitigation and unprotected personal interests of heirs are frivolous.

The primary reason why the heirs need not be joined to protect their individual interests is precisely the same reason why the heirs cannot relitigate any domicile finding reached in this interpleader

9. The Houston Probate Court ruled only two weeks ago that of the hundreds of persons claiming heirship under Texas law, the twenty-two signatories of this agreement were in fact the true heirs of Hughes. It is too early to know whether that ruling will be appealed. But the fact that it has taken more than five years for an initial ruling on heirship confirms that heirs, or potential heirs prior to resolution of the heirship question, cannot be necessary parties to an interpleader such as this.

action: the interests of the heirs are completely represented by the administrators of the estate, who have full authority to represent those interests. The very nature and extent of this representation ensure that interests of the heirs will be carefully protected, which in turn guarantees that the heirs will be bound by any judgment rendered herein.

The role of an administrator as the representative of the entire estate, including the interests of the estate's beneficiaries, is crystal clear under state law. An administrator has the duty to marshal the assets of an estate and the right to possession of those assets pending distribution. Cal. Prob. Code §571; Tex. Prob. Code §37; ***In re Estate of Turino,*** 8 Cal. App. 3d 642, 87 Cal. Rptr. 581 (1970); ***Atlantic Ins. Co. v. Fulfs,*** 417 S.W.2d 302 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.). An administrator also has broad authority to institute all suits necessary for the preservation of the estate pending distribution. ***In re Estate of Turino, supra; Carnes v. Meador,*** 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); ***Glover v. Landes,*** 530 S.W.2d 910 (Tex. Civ. App.—Houston [1st] 1975, writ ref'd n.r.e.); Tex. Prob. Code §233. It is clear beyond cavil that the present interpleader action, brought to eliminate the possibility of both Texas and California imposing domicile-based death taxes on the intangibles of the estate, is one pursuant to the statutory rights and duties of an administrator to bring a suit necessary for the preservation of an estate. ***Id.*** The interests of the administrators and heirs in this proceeding totally coincide—both wish to preserve the largest estate possible by avoiding double taxation—and will be fervently represented by the administrators, who are under a fiduciary obligation to do so. ***See Humane Society of Austin & Travis County v. Austin Nat'l Bank,*** 531 S.W.2d 574 (Tex. 1975). Clearly, the heirs need not be joined to have their interests represented.

For this very reason, the heirs will be precluded from relitigating the issues decided in this interpleader action. This Court has repeatedly held that a person can be bound by the judgment in a proceeding to which he was not a party. ***Kersh Lake Drainage District v. Johnson,*** 309 U.S. 485 (1940); ***Chicago, R.I. & P. Ry. v. Schendel,*** 270 U.S. 611, 613-20 (1926); ***Heckman***

v. United States, 224 U.S. 413 (1912); *Shaw v. Railroad Co.,* 100 U.S. 605, 611 (1879); *Kerrison v. Stewart,* 93 U.S. 155, 160 (1879); *cf. Montana v. United States,* 440 U.S. 147 (1979) (non-party controlled prior litigation). Federal courts have recognized a variety of situations in which the relationship between a party and a non-party is "sufficiently close" to justify precluding the non-party, by applying *res judicata* or collateral estoppel, from relitigating issues resolved in his absence. *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84, 95 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977); *Aerojet-General Corp. v. Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975); *see* Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L. Rev. 27, 59-66 (1964); Vestal, *Res Judicata/Preclusion: Expansion,* 47 So. Cal. L. Rev. 357, 373-76 (1974).

One of the most well-settled situations in which this principle is applied to non-parties is encompassed by the rule that "a person whose interest was represented by one having authority to represent him is bound by the judgment, although he was not formally a party...." 1B *Moore's Federal Practice* ¶10.411[1] at 1253 (hereinafter "Moore"); *Expert Electric, Inc. v. Levine,* 554 F.2d 1227, 1233 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977); *Southwest Airlines Co. v. Texas International Airlines, Inc., supra.*

An example of this type of preclusion, demonstrating its appropriate application in the context of joinder, is found in *Heckman v. United States,* 224 U.S. 413 (1912). There the United States brought suit to set aside certain conveyances of lands allotted to Cherokee Indians, but conveyed by them during a period in which alienation of the land was prohibited by statute. The grantees of the land made the same argument Petitioners do here—that the Indian grantors, as owners of the land, should be joined as parties under *Shields v. Barrow,* 58 U.S. (27 How.) 130 (1854), in order to provide complete adjudication and to prevent relitigation. 224 U.S. at 444-45. The Court noted that the interest of the Indian grantors was represented completely by the United States and that "[t]heir presence as parties could not add

to, or detract from, the effect of the proceedings...." 224 U.S. at 445. The Court went on to explain:

> "[I]f the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. [citations omitted] And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question." (224 U.S. at 445-46)

Also subsumed within the rule that the preclusive effect of a judgment extends to a non-party whose interest was represented by a party with authority to do so is the relationship of fiduciary representative-beneficiary. As this Court explained in ***Sea-Land Services, Inc. v. Gaudet,*** 414 U.S. 573, 593-94 (1974):

> "[N]onparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties. In such cases, 'the beneficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship; they are ... bound by the rules of collateral estoppel in suits upon different causes of action,' F. James, Civil Procedure §11.28, p. 592 (1965)."

The fiduciary relationship between an estate administrator and an heir to an estate falls squarely within the ambit of this rule. ***See Southwest Airlines Co. v. Texas International Airlines, Inc., supra,*** 546 F.2d at 95; ***Pollard v. Cockrell,*** 578 F.2d 1002, 1008-1009 (5th Cir. 1978). As formulated by Professor Moore in traditional terminology, the rule is that "the administrator or executor on the one hand and the heirs ... on the other, are privies on the basis of their concurrent relationship to the personal property...", 1B Moore ¶10.411[12] at 1665, "so that a judgment

rendered for or against one party to the relationship is normally conclusive... in litigation by or against the other...." *Id.* at 1672. Not surprisingly, federal courts have reached this same conclusion, holding that the preclusive effect of a judgment rendered against the administrator of an estate extends to nonparty beneficiaries of the estate. *Chicago, R.I. & P. Ry. v. Schendel,* 270 U.S. 611, 620 (1926); *McCrocklin v. Fowler,* 285 F.Supp. 41 (E.D. Wis. 1968), *aff'd,* 411 F.2d 580 (7th Cir. 1969).

The validity of this conclusion is confirmed by Rule 17(a) of the Federal Rules of Civil Procedure, which codifies long-recognized federal practice by providing that an executor or administrator is the real party in interest and may sue in his own name *without joining* the party for whose benefit the action is brought. *See Childress v. Emory,* 21 U.S. (8 Wheat.) 642, 669 (1823); *Mecom v. Fitzsimmons Drilling Co.,* 284 U.S. 183 (1931); *Boeing Airplane Co. v. Perry,* 322 F.2d 589 (10th Cir. 1963), *cert. denied,* 375 U.S. 984 (1964); *Estate of Johnson v. Bellville Hospital,* 56 F.R.D. 380 (S.D. Tex. 1972); *McElroy v. Security Nat'l Bank,* 215 F.Supp. 775 (D. Kan. 1963).

The purpose of the real party in interest rule was stated in the Advisory Committee Note to the 1966 amendment to Rule 17(a):

> "[T]he modern function of the rule in its negative aspect is simply *to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.*" (39 F.R.D. 69, 85 (1966)(emphasis added); *see Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1208 (9th Cir. 1975), *cert. denied,* 425 U.S. 959 (1976)).

Thus Rule 17(a) incorporates, as one of the basic tenets of federal procedure, the principle that a beneficiary of an estate is bound by a judgment rendered in his absence against the executor or ad-

ministrator of the estate.[10]

Petitioners seek to avoid this long-standing precedent by asserting that the heirs are personally liable for state death taxes and therefore they, not the administrators, are the real parties in interest, and the administrators are incapable of representing the heirs. The cornerstone of this argument is *Allen v. Flournoy*, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972), which Petitioners would interpret as making the heirs indispensable parties to any proceeding which would affect the amount of death tax to be paid by an estate. Petitioners' argument is ill-conceived for at least three reasons: one, it misinterprets *Allen v. Flournoy;* two, the existence of potential personal liability on the part of the heirs does not affect the application of the preclusion doctrine; and, three, heirs are not indispensable parties to a lawsuit involving a liability or an asset that falls directly upon the heirs rather than upon the estate.

Petitioners stretch *Allen v. Flournoy, supra,* beyond the breaking point; that case will not support the ponderous weight of Petitioners' argument. In *Flournoy,* the court merely held that due process requires that all heirs who are easily ascertainable be given notice of the tax appraiser's report in a proceeding which fixes inheritance taxes on the transfer of *non-probate* property. *See Westinghouse Electric Corp. v. County of Los Angeles,* 42 Cal. App. 3d 32, 116 Cal. Rptr. 742 (1974); *Johnson v. Alma Investment Co.,* 47 Cal. App. 3d 155, 120 Cal. Rptr. 503 (1975). It does not hold that heirs must be joined in every proceeding which could affect, directly or indirectly, an

---

10. This universally-accepted principle is also recognized in section 85 of the Restatement (Second) of Judgments (tentative draft No. 2, 1975) which provides, in pertinent part:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of res judicata as though he were a party. A person is represented by a party who is:
>
> ...
>
> (c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary;...

estate's inheritance tax liability. In fact, it does not even hold that heirs are indispensable parties to proceedings which fix the inheritance tax liability for property which passes under a will or by intestacy. The quotation from *Flournoy* upon which Petitioners so heavily rely—"'the heirs are 'indispensable part[ies] to that portion of the proceeding in which inheritance taxes [are] fixed....'", *Allen v. Flournoy*, 26 Cal. App. 3d 774, 781, 103 Cal. Rptr. 275, 279 (1972)—clearly limits any possible application of *Flournoy* to a "'proceeding in which inheritance taxes [are] fixed.'" In this case, no inheritance tax will be fixed and no heir will be held personally liable for any tax. All that will be determined in this case is the domicile of Howard Hughes at the date of his death, the threshold issue to any assessment of an inheritance tax. Following Petitioners' reasoning to its logical, but absurd, end, courts would be required to join the heirs at every stage of any proceeding which might affect the inheritance tax due. Such a result would immensely and irrationally encumber the inheritance tax and probate system and is not required. *Cf. Lennefelt v. Cranston*, 231 Cal. App. 2d 171, 41 Cal. Rptr. 598 (1964).

Petitioners' conjured specter of the potential personal liability of the heirs does not make the heirs the real parties in interest in this proceeding, nor does it alter the application of the traditional principles of preclusion set forth above. This Court recently explained that, at least for procedural purposes—which surely include joinder—Rule 17(a) determines who is the real party in interest. *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 462 (1980). Moreover, Petitioners offer no reason why the administrators cannot or should not represent whatever interest the heirs may have in this tax proceeding. Petitioners fail to differentiate this potential tax claim against the heirs from the multitude of other tax claims and creditors' claims which are regularly handled by estate administrators. Because any California inheritance taxes would be paid by the administrator prior to distribution of the estate (Cal. Rev. & Tax. Code §§14121, 14127), as will all other estate liabilities, the fact that the heirs might be personally liable for such taxes is truly a distinction without a difference. This case is simply one brought by the administrators to preserve the assets of the estate and is the first step in the long taxing process. As such, it

falls into the general category of lawsuits which an administrator is empowered to bring for the benefit of the heirs, in which, according to Professor Wright, the heirs need not be joined.

> "Normally, however, state substantive law gives the administrator or executor control of a suit for wrongful death, and the fiduciary is not required to join the persons for whose benefit the action is brought; the same would be done in a federal court action."
> (6 C. Wright & A. Miller, ***Federal Practice & Procedure*** §1548 at 670)

An additional line of cases illustrates the error in Petitioners' position that the potential heirs are indispensable parties to this litigation because the tax liability which will be affected by the outcome of this suit falls on the heirs rather than the estate. It is well settled that in determining diversity jurisdiction, courts must look, ***sua sponte*** if necessary, at the citizenship of indispensable parties to the litigation. The court must join them if they are not parties even if to do so would defeat diversity jurisdiction. ***E.g., Jett v. Zink,*** 362 F.2d 723 (5th Cir. 1966). On several occasions, courts have held that even where the asset (and conversely the liability) belongs to the heirs and not to the estate, if the administrator is authorized to bring the lawsuit, then the court should look only to his citizenship. ***Mecom v. Fitzsimmons Drilling Co., supra; Bush v. Carpenter Brothers, Inc.,*** 447 F.2d 707 (5th Cir. 1971); 13 C. Wright, A. Miller & E. Cooper, ***Federal Practice & Procedure,*** §3606 (1975). In ***Mecom v. Fitzsimmons, supra,*** the Supreme Court noted with approval the rule that in wrongful death cases in which by statute the amount recovered belongs to the heirs and not to the estate, the citizenship of the administrator, ***i.e.*** the indispensable party, controlled. Consequently, it follows than even in such cases, heirs are not indispensable parties and need not be joined.

Petitioners' simultaneous solicitude for the interest of the heirs and fear of relitigation by them are made even more unbelievable by the fact that Annette Gano Lummis, the now-deceased aunt of Howard Hughes, is the sole heir to the Hughes estate under California law. Cal. Prob. Code §226. The executor of her estate

is therefore the only person other than the administrators of the Hughes estate liable to the State of California for its inheritance tax. Cal. Rev. & Tax. Code §14101. While the heirs may agree among themselves as to the distribution of the estate and the apportionment of the inheritance tax, the tax itself becomes fixed at death, and such an agreement does not affect the right of California to the tax or change the basis upon which it is to be computed. *Cohn v. Cohn,* 20 Cal. 2d 65, 123 P. 2d 833 (1942); *In re Estate of Rossi,* 169 Cal. 148, 146 P. 430 (1915); *In re Estate of Holt,* 61 Cal. App. 464, 215 P. 124 (1923); *Kelso v. Sargeant,* 11 Cal. App. 2d 170, 54 P. 2d 26 (1936). In other words, the settlement agreement is disregarded in computing the inheritance tax due. California Controller's Inheritance Tax Regulation 13409(b); Cal. Admin. Code Tit. 19, p. 660.4; CCH Inheritance, Estate and Gift Taxation Reporter, State Vol. 1, ¶15,318; *Cory v. Walsh,* 72 Cal. App. 3d 895, 140 Cal. Rptr. 462 (1977).

Though as a practical matter the administrator, as required by law, will pay all inheritance taxes prior to distribution of the estate, if distribution were to occur prior to the deduction of the tax, the administrator and the executor of Mrs. Lummis' estate would alone be liable to California. Cal. Rev. & Tax. Code §§14121, 14143; *In re Pearson's Estate,* 90 Cal. App. 2d 436, 203 P. 2d 52 (1949); *Cohn v. Cohn, supra.* The signatories to the settlement agreement would be liable only to the estate of Mrs. Lummis, and solely because of their private contractual agreement to pay a portion of the tax in relation to their distributed share. These signatories thus never enter the picture for purposes of California's inheritance tax and certainly will not be personally liable for it. Petitioners clearly have nothing to fear from, and no legitimate concern about, the signatories to the settlement agreement.

Finally, for an intensely practical reason, the joinder of heirs or potential heirs cannot be proper in an action such as this. This is not a proceeding to determine who the heirs are or what their tax liabilities may be. The entire estate has not been tendered into the registry of the Court for a resolution of all claims against it. This suit will resolve only the issue of domicile—the threshold inquiry in

the taxing process—and the heirs have no role to play in such a lawsuit.

It is unrealistic to suggest that at the second stage of such an interpleader, all the potential heirs, and their respective attorneys, will be controlling the litigation on behalf of the estate. For if the domicile issue were in the control of the various potential heirs, these heirs would presumably be free to make their own peace with the claimant taxing authorities, which could result in a hodgepodge of settlements that could turn the remainder of the administration, as well as the remainder of the interpleader action, into a circus. In addition, potential heirs, who are not even assured of a share in the estate assets, would be forced to bear the substantial costs of litigating the merits of the domicile issue.

The scenario would be even more bizarre in this case, where the intestacy laws of the asserted domiciliary states differ. Petitioners seek to join a person—allegedly a resident of Denver—who is an heir only under the intestacy laws of Texas, in order to bootstrap a change of venue from Texas to Colorado in an effort to obtain a California domiciliary finding, which would render the alleged resident of Denver not an heir at all and would consequently establish that his residence could not have supported a change of venue. The irony of that situation confirms that the law of joinder does not permit, and surely cannot require, that the heirs be added as parties.

B. The Lower Courts Correctly Denied Petitioner's Motion to Transfer This Case

Petitioners contend that if the heirs are joined, this Court ***is required*** to uproot this litigation from the district where it has been pending for more than three years and summarily drop it more than one thousand miles away on the unwitting courts and people of Denver, Colorado. This remarkable contention is made without so much as a mention of the factors under 28 U.S.C. §1404(a) that govern such a transfer or the evaluation of those factors made by the district court in denying Petitioners' motion to transfer the case to Los Angeles. Petitioners rely solely on a talismanic invocation of the term "juror prejudice"—which is unsubstantiated, un-

justified, and unfair—to argue that all traditional legal and factual reasons for denying this transfer can and should be overridden in the name of "the interest of justice". However, "[t]he requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953). Justice is best attained when a "body of law developed over a period of years is evenhandedly applied." *Federated Dept. Stores, Inc. v. Moitie*, __U.S.__, 101 S.Ct. 2424, 2429 (1981). Here, the law is clear that transfer was properly denied.

The most complete and well-reasoned judicial treatment of the venue arguments advanced by Petitioners demonstrates that the conclusion reached by the district court in Austin would also have been reached by the federal judiciary of the Central District of California. For in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 497 (C.D.Cal. 1981)(hereinafter "*L.A. Coliseum v. NFL*"), all of Petitioners' "neutral forum" arguments, and then some, were fully reviewed and rejected. For those same reasons, plus the fact that Colorado is not an available transferee forum here, the denial of Petitioners' motion for change of venue should be affirmed.

First, as Petitioners concede, unless the heirs are joined this case cannot be transferred to Denver because no claimant would reside there and the District of Colorado would therefore not be one where this action "might have been brought" in the first instance. 28 U.S.C. §§1397, 1404(a). But even if the twenty-two signatories to the inter-heir settlement agreement are joined as parties, this same impediment exists, for there has been absolutely no showing that any of those twenty-two signatories resided in Colorado on July 14, 1978, when this suit was filed. Because the relevant date for determining where an action "might have been brought" is the date of the filing of the original complaint, it is incumbent upon Petitioners to prove that as of July 14, 1978, a claimant resided in Colorado. *Allegaert v. Chemical Bank*, 432 F.Supp. 685 (E.D.N.Y. 1977); *Harry Rich Corp. v. Curtiss-Wright Corp.*, 308 F.Supp. 1114 (S.D.N.Y. 1969); *Leith v. The Rocroi*, 203 F.Supp. 48 (S.D. Tex. 1962); *cf.*

Hoffman v. Blaski, 363 U.S. 335 (1960); Rule 15, Fed. R. Civ. P.

The record below does not contain a morsel of proof that a claimant resided in Colorado at the time this suit was brought. In fact, there is not even an allegation to that effect. The only allegations that a claimant resides in Colorado are found in California's Memorandum in Support of Motion for Change of Venue.

> "As shown in Exhibits F and G to the Mayer affidavit, these additional parties reside in Texas, Massachusetts, Ohio, Florida and Colorado." (R.I. 85).
>
> "As the granting of our motion for joinder of additional parties will require Plaintiffs to file an Amended Complaint which includes an heir resident in Colorado, that district is one where this case could be brought within the meaning of Section 1404(a)". (R.I. 88).

Neither of these allegations assert that a party sought to be joined was a resident of Colorado on July 14, 1978. Moreover, mere allegations without factual support are insufficient to support a 1404(a) motion. *Kisko v. Penn Central Transportation Co.,* 408 F.Supp. 984 (M.D. Penn. 1976).

Petitioners' factual support is deficient. They rely entirely on the affidavit of Steven L. Mayer, dated August 24, 1978, and exhibits F and G attached thereto. (J.A. 24-32). Neither this affidavit nor the attached exhibits indicate that an heir resided in Colorado on July 14, 1978.

> "The known heirs to the Hughes estate have entered into a series of settlement agreements, which purport to distribute the estate to the heirs in specified percentages, irrespective of the state ultimately found to be Mr. Hughes' domicile.
>
> Attached hereto as Exhibit F-1 is a true and correct copy of the original Settlement Agreement reached between the heirs in 1976; and Exhibit F-2 attached hereto is a true and correct copy of the Supplemental Agreement signed in 1977. Attached to the agreements are true copies of the notarized signatures of the heirs which,

> assuming the heirs signed the agreement in their states of residence, indicates their geographical distribution. It can be seen that, as of the date of the recent Supplemental Agreement, the heirs resided in Ohio, Massachusetts, Colorado, Texas and Florida. A list of the heirs which shows the date and place they signed the Supplemental Agreement is attached hereto as Exhibit G. In addition, I have been informed by members of the firm of Andrews, Kurth, Campbell and Jones, counsel for plaintiffs herein, that at least one heir presently resides in the District of Colorado." (J.A. 24-25).

What this affidavit does *not* state is significant. It does not state which heir allegedly resides in Colorado, nor does it state that any heir resided in Colorado on July 14, 1978.

Exhibits F and G do not contain any factual proof than an heir resided in Colorado on July 14, 1978. Petitioners rely on the assumption that the heirs signed the Settlement Agreement and Supplemental Agreement in their state of residence, and then note that several of the heirs signed these documents in Colorado. This proof is insufficient for two reasons. First, the assumption that the heirs signed in their place of residence is unfounded. The heirs could have signed in Colorado and lived elsewhere. The exhibits themselves indicate as much. Three of the heirs, Elspeth De Pould, Margot Fleming Houstoun and John McIntosh Houstoun, acknowledged the original agreement on July 10, 1976 in Colorado. (J.A. 27). As to the Supplemental Agreement, however, De Pould acknowledged in Cuyahoga County, Ohio, (J.A. 32), and Margot Fleming Houstoun acknowledged in Harris County, Texas. (J.A. 34). Only John McIntosh Houstoun acknowledged in Colorado, and this was done June 10, 1977. (J.A. 34). Allene Lummis Russell acknowledged once in Texas and once in Massachusetts. (J.A. 28, 33). Barbara Cameron executed once in California and once in Ohio. (J.A. 29, 32). And Richard C. Gano, Jr., the administrator of the estate of Howard Hughes in California, who by statute must be a resident of California,[11] executed the Sup-

11. Cal. Prob. Code §420 requires administrators to be bona fide residents of California.

plemental Agreement in Harris County, Texas. (J.A. 33). Even if the site of signing these agreements were proof of the signatories' residence as of the date of signature, none of the dates on which the alleged Colorado residents signed the documents is related to the determinative date of July 14, 1978. Thus, the statements concerning residence in the Mayer affidavit are merely unsupported conclusions, which will not support a change of venue. *Texas Gulf Sulpher Co. v. Ritter,* 371 F.2d 145 (10th Cir. 1967); *Jones v. Walt Disney World Co.,* 409 F.Supp. 526 (W.D.N.Y. 1976); *Sinclair Oil Corp. v. Union Oil Co. of California,* 305 F. Supp. 903 (S.D.N.Y. 1969).[12]

Should this Court find that Colorado is a forum where this suit might have been brought on July 14, 1978, this case still should not be transferred. Petitioners have not met their burden of showing that it is in the interest of justice that the case be transferred to Colorado, nor have Petitioners even addressed the other factors under 28 U.S.C. §1404(a), which militate strongly against the proposed transfer.

The reasons offered in support of a transfer to Colorado all rest on an assumption of juror prejudice. Petitioners assert that the minute financial interest which Texas jurors might have in the outcome of the case, "the parochial effects of local and regional pride" (Pet. Br. 13), and the influence of prior publicity covering the 1978 Houston domicile trial make it impossible to hold a fair trial in Austin, Texas.[13] These arguments that a transfer is

---

12. Nor does the statement that Mr. Mayer had been informed that "at least one heir presently resides in the District of Colorado" add any strength to his affidavit, for it does not indicate that an heir resided in Colorado on July 14, 1978.

13. Petitioners further claim that it is "inappropriate to compel a state to resort to the tribunals of another state for redress" because it will have an impact on state sovereignty. (Pet. Br. 16). This concern about state sovereignty is nothing more than a reiteration of Eleventh Amendment and sovereign immunity concepts. However, for a district court to have jurisdiction over this interpleader action, it will necessarily have been held that the Eleventh Amendment and sovereign immunity do not apply. That being the case, Petitioners' sovereignty concerns evaporate as well, since no state's sovereignty will be challenged.

(footnote continued on following page)

necessary to provide a "neutral forum" ignore the very logic underlying the grant of diversity jurisdiction to federal courts. Petitioners would be submitting their claims to a federal district court, a "national tribunal," (*Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888)), whose jurisdiction under 28 U.S.C. §1335 would be bottomed on diversity of citizenship. The very rationale for that jurisdictional grant was that a federal district court would provide a forum in which out-of-state litigants could escape local prejudice. 13 C. Wright & A. Miller, *Federal Practice & Procedure*, §3601 at 574 (1972).

Petitioners contend that even if the district court were fair, Texas jurors would not be. This assumption of juror bias dangles from three thin strands—pecuniary interest, regional pride, and prior publicity—which cannot support a transfer. The primary argument is that the dizzying sum of $6.02[14] that each juror might stand to gain in taxes by a verdict of Texas domicile would make the jury panel ignore their sacred juror's oath and render a verdict based on pecuniary self-interest rather than on the evidence adduced. Merely to state this reasoning shows why the cases relied on by Petitioners are inapposite. For in contrast to this case, the fact finder in *Tumey v. Ohio*, 273 U.S. 510 (1927), received approximately $100 per month from his pecuniary interest in convictions, while the justice of the peace in *Connally v. Georgia*, 429 U.S. 245 (1977), made more than $50,000 in three years by issuing

---

(footnote continued from previous page)

Furthermore, even if Petitioners were right about the impact on state sovereignty, transfer of this case to Colorado would only exacerbate the problem, for then two, rather than one, sovereign states would be required to litigate their claims in a sister state.

14. In the petition for certiorari, Petitioners claimed that each juror's stake in the outcome of the case would be $12.34, a figure based on the valuation of the Estate by the California inheritance tax referee. Petitioners now utilize the valuation by the Internal Revenue Service, apparently recognizing that under the California valuation of the Hughes estate, ample assets exist to satisfy the tax claims of the United States, California and Texas, thus precluding original jurisdiction in this Court under *Texas v. Florida, supra.* *See* Texas' Brief in Opposition, *California v. Texas*, No. 88, Original, at 8-12.

warrants, and those fees were his salary. Here, there is no substantial, repeating and direct interest by Texas jurors as existed in *Tumey* and *Connally*. The one-time, indirect interest of $6.02 that a juror might have is clearly *de minimus* and does not mandate transfer of the case. *L.A. Coliseum v. NFL, supra; Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568 (E.D. Va. 1975); *cf. Dugan v. Ohio*, 277 U.S. 61 (1928) (distinguishing *Tumey*).

The suggestion that "the pride and affection which each Texas juror justifiably has for the State of Texas" (Pet. Br. 13) would cause the rendition of an improper verdict is the unkindest cut of all. Nothing is more "unfair" and "unseemly" than this attempt to twist the concept of "Texas pride" to impugn the integrity, impartiality and honesty of Texas jurors. That pride is based on the very qualities Petitioners now call into question. When a similar argument was made by the NFL about the emotional and political biases of Los Angeles jurors concerning an issue infinitely more charged with emotion than the dry question of domicile—the location of a professional football team—the court noted that, as here, "there has been no attempt to compile any statistical or survey data to substantiate this claim" and decided that "any decision on the extent of alleged 'emotional' or 'political' biases must await further substantiation in the context of the voir dire." *L.A. Coliseum v. NFL, supra*, 89 F.R.D. at 510.

Petitioners' professed fears about publicity concerning the prior state court domicile trial and verdict are similarly unfounded. These arguments were weak and exaggerated when first offered to the district court in the fall of 1978, some eight months after the end of the Texas trial. Now, almost four years after that trial, any possible impact of media coverage in the Austin area about the Houston trial has completely dissipated. By the time this case reaches trial, no residual effect of prior publicity could possibly exist.

The voir dire process is designed to screen any potential juror who may actually be affected by the factors which worry Petitioners. If this case is to be transferred due to juror partiality, it should only be done by the district court after a thorough voir dire examination, rather than on the basis of Petitioners' unfounded

assumptions. *See United States v. Haldeman*, 559 F.2d 31, 62-63 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Lamb*, 575 F.2d 1310, 1315 (10th Cir.), cert. denied, 439 U.S. 854 (1978) ("The proper occasion for determining juror partiality is upon voir dire examination.").

> "Since the defendants here have submitted no such evidence [statistical evidence or the results of opinion polls], and since the copies of newspaper articles thus far submitted do not compel a conclusion, prior to voir dire, that six fair and impartial jurors cannot be found in this district, the argument that the central district is not a 'fair and impartial' forum due to pre-trial publicity must be rejected at this time." (*L.A. Coliseum v. NFL, supra*, 89 F.R.D. at 509)

There has been absolutely no showing that the system of voir dire and juror instruction will be incapable of handling any potential juror bias in this case. The Court should not indulge Petitioners' assumptions[15] that the system will not work, when the appropriate presumption is that it will. "[I]t is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court...", *United States v. Sorcey*, 151 F.2d 899, 903 (7th Cir.), *cert. denied*, 327 U.S. 794 (1945), and "we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists." *Chicago, R.I. & P.Ry. v. Igoe*,

---

15. Petitioners' conclusions of juror prejudice would require acceptance of the following assumptions: (1) that Austin jurors will be aware that a Texas domiciliary finding will affect Texas inheritance tax revenues (2) in a large amount (3) so that they will each benefit (4) by a maximum of $6.02; (5) that Austinites have immense pride in their heritage as Texans and (6) would be proud to consider Howard Hughes a fellow Texan; (7) that the venire lived in Austin five to eight years prior to trial (when the prior publicity occurred), (8) read the Austin newspapers then, (9) read the Hughes articles in the newspapers, and (10) remembered what they said; (11) that because of all of the above, the jurors will be unable to view the evidence impartially and (12) that the judge will be unable to ferret out those jurors who are unable to act impartially.

Obviously, this amazing string of assumptions and inferences cannot support a change in venue.

212 F.2d 378, 382 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955). *Accord, Patterson v. Louisville & Nashville R.R.*, 182 F.Supp. 95 (S.D. Ind. 1960).

Petitioners' view of the interest of justice is unduly weighted with self-interest. The trial of this case could well last several months, which will work an extraordinary hardship on the jurors selected to hear the case. As this Court has stated, "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509(1947); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977). It is not in the interest of justice to saddle the citizens of Denver with the time-consuming and expensive burden of this trial.[16]

Aside from their comments on the interest of justice, Petitioners do not even mention the factors which govern a transfer sought under 28 U.S.C. §1404(a). Although "venue is primarily a matter of convenience of litigants and witnesses," (*Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen, supra*, 387 U.S. at 560), Petitioners do not address these concerns. The reason for that omission, of course, is that the traditional considerations under section 1404(a) point directly to Austin as the appropriate forum for this litigation.

A trial in this case will involve three sets of litigants: Petitioners, respondents White and Bullock, and the Estate administrators. The lawyers for the Estate are located in Houston, Texas, as are the tens of thousands of documents in the Estate's possession relevant to the domicile question. (J.A.

16. The four concurring Justices who suggested this interpleader action presumably felt that the jurors in either Texas or California could hear this case with due impartiality. The concurring opinions never mention the prospect—let alone the necessity—of joining the heirs as claimants in order to make available an alternative, "neutral" forum. In fact, if the Eleventh Amendment does not bar such interpleader actions, venue in most future domicile cases would be laid in a claimant state by necessity. For example, if someone dies leaving his or her entire estate to his or her spouse, and two states claim to be the domiciliary state, it is highly likely that the spouse would reside in one of those two claimant states. In such case, even under Petitioners' expansive joinder argument, the only permissible forums would be in the claimant states.

139-140). Given this three party setting, a trial in Austin would be convenient for two of the three groups of parties. A trial in Los Angeles would be relatively convenient for Petitioners, and very inconvenient for the other parties. And a trial in Denver would be extremely inconvenient for all of the parties and their attorneys, and would cause litigation costs to skyrocket. *See L.A. Coliseum v. NFL, supra,* 89 F.R.D. at 501; *Altman v. Deramus,* 342 F.Supp. 72, 76 (S.D.N.Y. 1972); *Mobil Oil Corp. v. W. R. Grace & Co.,* 334 F.Supp. 117, 124 n. 5 (S.D. Tex. 1971).

> "Thus, unlike the usual transfer motion, where the court is asked to balance an increase in costs for one party against a significant decrease in the costs of another, the transfer requested here would result in greatly increased costs for every party to the suit." *(L.A. Coliseum v. NFL, supra,* 89 F.R.D. at 501)

The convenience of witnesses is often considered the most important factor governing transfer. *See L.A. Coliseum v. NFL, supra,* 89 F.R.D. at 501; *Saminsky v. Occidental Petroleum Corp.,* 373 F.Supp. 257, 259 (S.D.N.Y. 1974). While the great majority of the witnesses who testified at the prior Texas domicile trial reside in Texas, California, or Nevada, only two of those seventy-three witnesses reside in Colorado. Because of the age and health of many of the witnesses who knew Hughes in his earlier, less reclusive days, a trip into the high altitude of Denver would not only be vastly inconvenient, but perhaps dangerous. In this case, Denver would be a terribly inconvenient and expensive forum for all concerned.

Finally, because a plaintiff's choice of forums is strictly limited by applicable venue provisions—here, by 28 U.S.C. §1397—courts have often stated that the plaintiff's ultimate selection of venue should not be lightly disturbed. *See, e.g., Northern Acceptance Trust* 1065 *v. Gray,* 423 F.2d 653, 654 (9th Cir.), *cert. denied,* 398 U.S. 939 (1970); 1 *Moore's Federal Practice* ¶0.145[5] at 1616 (2d ed. 1980).

The Texas taxing officials have already expended a vast amount of time, and not an insubstantial amount of money and personal effort, litigating the issue of Hughes' domicile in state court. The Estate, which selected Austin venue, also incurred large litigation expenses during the Texas trial. Only Petitioners, who sat on the sidelines watching that initial fray, have yet to make significant outlays for litigation expense. Not surprisingly, it is Petitioners who now seek a transfer which will drastically increase litigation costs for all parties. The expenditures made during the prior Texas trial are due in no small measure to Petitioners' failure to assert any domicile claim with respect to Hughes until the very eve of the Texas trial. If relitigation of the domicile issue is to occur, with the attendant waste of most of the expense of the prior trial, venue of that relitigation should be laid in Austin, with the enormous savings of time and money that an Austin trial will mean to the Texas officials. And, of course, the concomitant savings in litigation expense by the Estate will benefit all parties, as it will increase the corpus of the estate upon which taxes may be assessed.

The District Court evaluated all of the factors appropriate under section 1404(a), and the evidence adduced with respect to those factors. In its discretion, the District Court correctly determined that Austin, Texas is the most appropriate forum for this case. That decision was a wise one, and certainly not an abuse of the District Court's discretion. The Court of Appeals affirmed that ruling. These decisions should not be reversed, and transfer of this case should not be ordered.

CONCLUSION

If the Eleventh Amendment is found to bar this action, these disputes between the Hughes estate and state taxing officials should be resolved in state court. However, if this action can proceed consistently with the Eleventh Amendment, statutory interpleader jurisdiction is present, the proper parties have already been joined, and venue of the case is now properly laid.

DATED: September 30, 1981.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

GILBERT J. BERNAL, JR.
Assistant Attorney General
Chief, Taxation Division
Post Office Box 12548
Austin, Texas 78711

RICK HARRISON*
PATTON G. LOCHRIDGE
McGINNIS, LOCHRIDGE & KILGORE
900 Congress Avenue
Austin, Texas 78701
(512) 476-6982

DAVID DEADERICK*
GIBBINS, BURROW, WASH
& BRATTON
Post Office Box 1452
Austin, Texas 78767
(512) 474-2441

Attorneys for Respondents
WHITE and BULLOCK

**Counsel of Record*

Office-Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONTROLLER OF THE STATE OF CALIFORNIA AND COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF TEXAS, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LUMMIS

O. CLAYTON LILIENSTERN*
PATRICIA A. STEVENSON
ANDREWS, KURTH, CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002
(713) 652-2412

Of Counsel:
PROFESSOR
JAMES WILLIAM MOORE
New Haven, Connecticut

R. JAMES GEORGE, JR.
JOHN M. HARMON
GRAVES, DOUGHERTY, HEARON & MOODY
2300 Austin National Bank Tower
Austin, Texas 78701
Attorneys for Respondent, William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr., Deceased.
*Counsel of Record

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTIONS PRESENTED

1. Whether a statutory interpleader action by an estate against the tax officials of two states is an action within this Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a).

2. Whether the Federal Interpleader Act provides a remedy for an estate which is confronted with mutually inconsistent death tax claims asserted by tax officials from two states.

3. Whether the federal district court, in this interpleader action, can provide a fair and impartial forum.

II

PARTIES

Plaintiffs[1] in the District Court were:

William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr. (*a citizen of Nevada*)

Defendants[2] in the District Court were:

Kenneth Cory, Controller of the State of California (*a citizen of California*)

H. B. Alvord, County Treasurer for the County of Los Angeles (*a citizen of California*)

and

Mark White, Attorney-General of Texas (*a citizen of Texas*)

Bob Bullock, Comptroller of Public Accounts of Texas (*a citizen of Texas*)

and

The United States of America

Petitioners before the Court are Cory and Alvord. All others are Respondents.

---

1. William R. Lummis and Annette Gano Lummis were originally Temporary Co-Administrators in Texas and co-plaintiffs in this action. Annette Gano Lummis subsequently died and her powers vested in William R. Lummis.

2. The other defendant administrators in the District Court were Lummis as the Louisiana Provisional Administrator of the Estate, Delaware Ancillary Administrator of the Estate, and together with First National Bank of Nevada (*a citizen of Nevada*), Nevada Co-Special Administrator of the Estate. Richard Gano (*a citizen of California*) is the California General Administrator of the Estate. The administrators were realigned by the District Court as plaintiffs.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
PARTIES	II
TABLE OF AUTHORITIES	IV
STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. STATUTORY INTERPLEADER JURISDICTION OVER THIS ACTION IS NOT PREEMPTED BY 28 U.S.C. § 1251(a).	10
II. STATUTORY INTERPLEADER IS AVAILABLE TO THIS ESTATE FOR RESOLVING THE THREAT OF MULTIPLE DEATH TAXATION.	12
III. THE ELEVENTH AMENDMENT DOES NOT BAR THIS INTERPLEADER ACTION.	14
A. This Action Invokes The *Edelman v. Jordan* Doctrine of Prospective Relief.	14
B. This Action Alleges Unconstitutional Activity By The Tax Officials.	18
C. This Action Alleges Other Illegal Activity By The Tax Officials.	22
D. This Action Is Distinguishable From The Holding In *Worcester County Trust Co. v. Riley.*	24
IV. THE REQUIREMENTS FOR STATUTORY INTERPLEADER, ADVERSITY AND DIVERSITY, ARE SATISFIED IN THIS ACTION.	26
A. The Tax Officials Are "Citizens Of Different States" For Purposes Of Interpleader Jurisdiction.	26
B. The Court Of Appeals' Finding Of Minimal Diversity Is Correct.	30
1. *Diversity Exists Between Lummis As Interested Stakeholder (A Citizen Of Nevada) And Alvord, Treasurer Of Los Angeles County (A Citizen Of California).*	30

Page

2. *The Diversity Finding As To Alvord Is Unaffected By The Recent Change In California Law.* 35

V. THE FEDERAL DISTRICT COURT, IN THIS INTERPLEADER ACTION, CAN PROVIDE A FAIR AND IMPARTIAL FORUM. 39

CONCLUSION 44

TABLE OF AUTHORITIES

CASES Page

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 40
Alabama v. Pugh, 438 U.S. 781 (1978) 24, 25
Austin v. Texas-Ohio Gas Co., 218 F.2d 739 (5th Cir. 1955) 33
Barrows v. Jackson, 346 U.S. 249 (1953) 22
Builders & Developers Corp. v. Manassas Iron & Steel Co., 208 F.Supp. 485 (D.Md. 1962) 31
California v. Texas, 437 U.S. 601 (1978) 3, 7, 8, 10, 11, 12, 13, 17, 19, 23, 29, 31
Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 14, 15
Connally v. Georgia, 429 U.S. 245 (1977) 41
Craig v. So. Natural Gas Co., 125 F.2d 66 (5th Cir. 1942) 29
Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) 20
Cruz v. Beto, 405 U.S. 319 (1972) 24
Dugan v. Ohio, 277 U.S. 61 (1928) 41
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 21
Dunn v. Blumstein, 405 U.S. 330 (1972) 21
Edelman v. Jordan, 415 U.S. 651 (1974) 8, 9, 13, 14, 15, 16, 17, 25, 27
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 16
Flast v. Cohen, 392 U.S. 83 (1968) 21
Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459 (1945) 15, 27
Fred Harvey, Inc. v. Mooney, 526 F.2d 608 (7th Cir. 1975) 38
Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970) 38
Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds, sub nom., Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) 28

CASES

	Page
Greene v. Louisville & I.R. Co., 244 U.S. 499 (1916)	23, 24
Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945)	40
Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947)	43
Hardenbergh v. Ray, 151 U.S. 112 (1894)	38
Harman v. Forssenius, 380 U.S. 528 (1965)	21
Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957)	31
Holcomb v. Aetna Life Ins. Co., 228 F.2d 75 (10th Cir. 1955), *cert. denied*, 350 U.S. 986 (1956)	33
Hutto v. Finney, 437 U.S. 678 (1978)	16
Jones v. Gasch, 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968)	42
Kansas City Southern R.R. Co. v. Morley, 88 F.Supp. 300 (W.D. Ark. 1950)	29
Kennametal, Inc. v. International Union, 161 F.Supp. 362 (W.D. Pa. 1958)	37
People ex rel. McColgan v. Bruce, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942)	29
Maria Santiago v. Corporacion de Renovacion, 554 F.2d 1210 (1st Cir. 1977)	16
Mollan v. Torrance, 22 U.S. (9 Wheat) 537 (1824)	36
Moor v. County of Alameda, 411 U.S. 963 (1973), *overruled on other grounds, Monnell v. Dept. of Social Services*, 436 U.S. 658 (1978)	35
Mouton v. Sinclair Oil & Gas Co., 410 F.2d 717 (5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970)	28
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	21
Ex parte Nebraska, 209 U.S. 436 (1908)	28
Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824)	15, 27
Pan Am. Fire & Cas. Co. v. Revere, 188 F.Supp. 474 (E.D. La. 1960)	31, 33
Passenger Cases, 48 U.S. (7 How.) 282 (1849)	20
Poindexter v. Greenhow, 114 U.S. 270 (1885)	22
Quern v. Jordan, 440 U.S. 332 (1979)	16, 27
Query v. 206 Cases of Assorted Liquor, 49 F.Supp. 693 (W.D.S.C. 1943)	29
Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894)	15, 22, 23, 24
Riley v. Worcester County Trust Co., 89 F.2d 59 (1st Cir.), 302 U.S. 292 (1937)	25, 29
Robertson v. Ingram-Day Lumber Co., 271 F. 1023 (5th Cir. 1921)	29
Robertson v. Jordan River Lumber Co., 269 F. 606 (5th Cir. 1921)	29

CASES

	Page
Scheuer v. Rhodes, 416 U.S. 232 (1974)	24
State of Ohio ex rel. Seney v. Swift & Co., 270 F. 141 (6th Cir.), *cert. denied*, 257 U.S. 633 (1921)	28
Shapiro v. Thompson, 394 U.S. 618 (1969)	20, 22
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	28
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	31, 33
State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194 (1928)	29
State Life Insurance Co. v. Daniel, 6 F.Supp. 1015 (W.D. Tex. 1934)	28
State Tax Comm'n of Utah v. Aldrich, 316 U.S. 174 (1972)	20
Television Reception Corp. v. Dunbar, 426 F.2d 174 (6th Cir. 1970)	38
Texas v. Florida, 306 U.S. 398 (1939)	12, 23
Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939)	31
Tumey v. Ohio, 273 U.S. 510 (1927)	41
Twining v. New Jersey, 211 U.S. 78 (1908)	20
United States v. Davis, 583 F.2d 190 (5th Cir. 1978)	42
United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977)	41, 42
United States v. Wheeler, 254 U.S. 281 (1920)	20
U.S. Steel Corp. v. Multistate Tax Comm'n, 367 F.Supp. 107 (S.D. N.Y. 1973)	29
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	41
Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961)	18, 19
William v. Fears, 179 U.S. 270 (1900)	20
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)	8, 9, 13, 14, 15, 24, 25, 26
Ex parte Young, 209 U.S. 123 (1908)	15

CONSTITUTION

U.S. CONST. AMEND. XI	7, 8, 9, 14, 15, 16, 17, 24, 27, 28
U.S. CONST. AMEND. XIV	27

Page

STATUTES AND RULES

28 U.S.C. § 1251(a) 1, 10
28 U.S.C. § 1331 ..... 1, 3, 16, 18
28 U.S.C. § 1335 ..... 1, 3, 31, 33, 40
28 U.S.C. § 1341 ..... 1, 29
28 U.S.C. § 1343(a)(3) 1, 2, 3, 20
28 U.S.C. § 1343(a)(4) 16
28 U.S.C. § 1391(a) 33
28 U.S.C. § 1397 ..... 1, 2, 33, 40, 44
28 U.S.C. § 1404(a) 1, 2, 9, 33, 40, 44
28 U.S.C. § 2410(a) 7
42 U.S.C. § 1983 ..... 1, 2, 3, 20
FED. R. CIV. P. 17 39
FED. R. CIV. P. 19 ..... 37, 39
FED. R. CIV. P. 53(e)(3) 40
SUPREME COURT RULE 21.1(a) 15
SUPREME COURT RULE 34.1(a) 15
CAL. REV. & TAX CODE §13303(a) (1970) 23
CAL. REV. & TAX CODE § 13401 (1970) 23
CAL. REV. & TAX CODE § 14104 (1970) 1, 35
CAL. REV. & TAX CODE § 14791 (1970) 1, 35
CAL. REV. & TAX CODE § 14793-95 (1970) 1, 35
Ch. 634, CAL. STATS., 1980 1
TEX. TAX - GEN. ANN. art. 1401 (Supp. 1978) 23

SECONDARY AUTHORITY

3A Moore's FEDERAL PRACTICE § 22.02[2] (1978) .. 17
3A Moore's FEDERAL PRACTICE § 22.09[1] (1979) .. 32
12 Moore's FEDERAL PRACTICE § 300.03[3.-5] (1981) 15
S. REP. NO. 1830, 85th CONG., 2nd SESS. *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3118 .. 40
6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §§ 1543, 1548 (1971) 39
7 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §§ 1710, 1712 (1972) 31, 33, 34, 39
13 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3608 (1975) 37, 38
14 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3636 (1976) 32

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1251 (a), 28 U.S.C. § 1331, 28 U.S.C. § 1335(a), 28 U.S.C. § 1341, 28 U.S.C. § 1343(a)(3), 28 U.S.C. § 1397, 28 U.S.C. § 1404(a), 42 U.S.C. § 1983, and sections 14104, 14791, 14793-95 of the California Revenue and Taxation Code, and Chapter 634 California Statutes, 1980.

28 U.S.C. § 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

28 U.S.C. § 1331(a) provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, . . ."

28 U.S.C. § 1335(a) provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

28 U.S.C. § 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any

tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. § 1343(a)(3) provides in pertinent part:

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . ."

28 U.S.C. § 1397 provides:

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

28 U.S.C. § 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The California statutes referred to above are set forth in Appendix I of the Petition for Certiorari (hereinafter "Pet. App.").

STATEMENT OF THE CASE

Respondent William R. Lummis ("Lummis") generally agrees with the Statement of the Case contained in pages 2-6 of the Brief for Petitioners. There is, however, additional background information which may be relevant to the Court's consideration of the issues in this case.

This action is the sequel to the original action, *California v. Texas*, 437 U.S. 601 (1978), and was brought at the suggestion of the four Justices who wrote opinions in connection with the Court's decision in that case. It is a statutory interpleader action brought under 28 U.S.C. § 1335 which requires that there be two or more adverse claimants of diverse citizenship who claim or may claim a right to the money or property constituting the fund.[3] The action seeks a unitary adjudication of the domicile of Howard R. Hughes, Jr. ("Hughes") at the time of his death in order to protect the Hughes Estate ("Estate") against multiple tax claims by, and multiple liability to, the tax officials of California and Texas. The Estate asks for only prospective relief, *i.e.*, declaratory relief as to the domicile of Mr. Hughes at death, and necessary and appropriate injunctive relief.

---

3. Jurisdiction is also predicated on 28 U.S.C. § 1331, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3).

A. The Dilemma Facing The Estate

Lummis alleges, based on an extensive factual investigation, that Mr. Hughes was domiciled in Nevada at death. Nevertheless, this Estate is faced with the very real possibility that the intangible assets of the Estate, which constitute over 99% of its value (Testimony of William R. Lummis ["Lummis Test."], A. 119) will be subjected to state death taxes by both Texas and California. This threat exists because in the absence of a unitary determination in a federal interpleader action, the state courts of both Texas and California are likely to determine that Mr. Hughes was domiciled in their respective jurisdictions at death, thus enabling the states to assess death taxes against the Estate. Both the California tax officials ("Cory and Alvord") and the Texas tax officials ("White and Bullock") assert the right to tax the intangible assets on the same basis, that Mr. Hughes died domiciled within their respective states.

The Internal Revenue Service computes the gross value of the Estate to be approximately $465,000,000 (Lummis Test., A. 122). The California Inheritance Tax Referee values the gross estate at $1,106,345,516 (R. I, 106, 107).[4] The Administrators of the Estate value the gross estate at $166,800,000 (Lummis Test., A. 125). In the event that the Internal Revenue Service assesses estate taxes at the applicable rate of approximately 77%, less 16% for a state death tax credit or approximately 61%, together with the state of Texas at the applicable rate of approximately 16% and the state of California at the applicable rate of 24%, the Estate would have federal

4. References to the record are by volume and page.

and state death taxes assessed against it at the rate of approximately 101%, in the amount of $763,400,000 including interest (Lummis Test., A. 125).[5] The total tax that would be due and owing from the Estate if the federal, Texas, and California tax authorities were all permitted to assess and collect their asserted taxes against the Estate is thus one and two thirds greater than the value placed on the entire gross estate by the Internal Revenue Service and more than four times the gross value reported by the Estate.

B. Administration Proceedings

Mr. Hughes died on April 5, 1976. During that year administration proceedings with respect to his Estate were commenced in the probate courts of Texas, California, Nevada, Delaware, and Louisiana, where assets of the Estate were located. All five administrations are currently active and pending.

The domicile issue was tried before a jury in Probate Court # 2, Harris County, Texas, and on April 10, 1978, judgment was entered that Mr. Hughes was domiciled in Texas at the time of his death. Cory and Alvord were not parties to that proceeding. Lummis, who contended that Mr. Hughes died domiciled in Nevada, timely perfected an appeal of that judgment and it is therefore not operative as *res judicata* under Texas law.

California death tax proceedings were initiated with the appointment of an Inheritance Tax Referee who has

---

5. This assumes that the Internal Revenue Service uses its valuation, that the Texas officials' valuation is approximately that of the Internal Revenue Service, and that the California officials use their own valuation.

stated his intent to file a report claiming that Mr. Hughes was domiciled at death in California and that the entire Estate, excluding real and tangible personal property located outside California, but including all intangible assets wherever located, is subject to California inheritance taxation (R. I, 106-107).

The vast majority of the assets of the Estate consist of the stock of Summa Corporation, a Delaware corporation wholly owned by Mr. Hughes at the time of his death (Lummis Test., A. 119). The Delaware Chancery Court has entered an order requiring Summa, until further order, to recognize Lummis, in his capacity as Ancillary Administrator of the Estate in Delaware, as the sole shareholder of Summa (Lummis Test., A. 120). The domicile issue has been pending in the Nevada administration since the completion of the seven-month "Mormon Will" trial where a jury adjudged that document to be a forgery. Mr. Hughes' domicile at death is not at issue in the Louisiana proceeding.

The Texas tax officials appeared in the Delaware proceeding and the Texas Attorney General appeared in the Nevada proceeding, but they now disclaim that their appearances were general appearances and take the position that they will not be bound by and will not accord recognition to any judgment as to domicile in any proceeding outside the state of Texas. The California tax officials claim to have made no appearance in any proceeding outside the state of California and take the position that they will not be bound by and will not accord recognition to any judgment as to domicile in any proceeding outside of California.

C. The Federal Interpleader Action

Three weeks after the Court's ruling in *California v. Texas,* Lummis filed a bill in the nature of interpleader, later amended, in the United States District Court for the Western District of Texas, Austin Division. The Texas tax officials and the California tax officials each filed a motion to dismiss, asserting that the action was barred by the Eleventh Amendment and that the federal interpleader requirement that there be two or more adverse claimants of diverse citizenship who claim or may claim entitlement to the fund was not met. The district court granted the motions, holding that it lacked jurisdiction over the action.

Lummis timely appealed to the United States Court of Appeals for the Fifth Circuit. An injunction pending appeal was issued by the Court of Appeals, and in reliance on that injunction, the Texas Court of Civil Appeals stayed the appeal of the Texas domicile judgment pending the outcome of the federal interpleader action.

The Court of Appeals held that the district court had jurisdiction over this interpleader action and reversed and remanded the case.[6] The Petition for Rehearing en Banc filed by Cory and Alvord was denied, as was their later Motion for Leave to File Petition for Rehearing Out Of Time.

All parties are presently enjoined, under the injunction pending appeal, from litigating the issue of Mr. Hughes'

6. The Court of Appeals declined to consider the issue of whether the United States had been properly joined as an interpleader claimant under 28 U.S.C. § 2410(a) because this issue had not previously been decided by the district court. (Pet. App. 13a, n. 14). The Court of Appeals remanded the issue to the district court for decision.

domicile at death other than in this interpleader action. However, if interpleader jurisdiction is not sustained by this Court, the Estate will once again be faced with the threat of double state death taxation and the certainty of multiple, vexatious, and unnecessary litigation.

SUMMARY OF ARGUMENT

This interpleader action was brought at the suggestion of four Justices in *California v. Texas,* 437 U.S. 601 (1978), who indicated that perhaps statutory interpleader as a remedy for the dilemma caused by multistate death taxation is an idea whose time has finally come. Lummis therefore joined in this action the tax officials of Texas and California, the other Administrators of the Estate, and the United States, in an effort to obtain one final adjudication binding all interested parties and all parties who claim or may claim to be entitled to the interpleader fund.

There is no present controversy between the states of Texas and California which requires the exercise of this Court's original jurisdiction. Such a controversy will not arise if this interpleader action resolves the question of which state's tax officials, if either, are entitled to assess death taxes against the intangible assets of the Estate.

The Eleventh Amendment is no bar to this action. As noted by the four Justices in *California v. Texas,* the holding in *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937), has been substantially eroded by subsequent decisions of this Court. Moreover, *Edelman v. Jordan,* 415 U.S. 651 (1974) suggests that there has

been a shift in focus in resolving Eleventh Amendment issues, from alleged wrongdoing (unconstitutionality or other illegality) to the nature of the relief sought. Whether measured against the *Edelman* standard or the more traditional standard of alleged wrongdoing, the Eleventh Amendment is nevertheless not a bar to this action. No party to this action challenges the fact that Lummis seeks only prospective injunctive, declaratory relief. Moreover, if *Worcester County* is still considered viable, it is not dispositive of this action because the two cases are distinguishable.

This is a classic bill in the nature of interpleader. Would-be creditors from two different states assert conflicting claims to the same assets; Lummis denies liability to both. The action abounds with the requisite adverse claimants of diverse citizenship, *i.e.*, Cory and Alvord, citizens of California; White and Bullock, citizens of Texas; and Lummis and First National Bank of Nevada, citizens of Nevada.

The Court of Appeals correctly determined that this action was properly brought under the Federal Interpleader Act, in that Lummis the interested stakeholder, and Alvord the Treasurer of Los Angeles County, are adverse, diverse claimants under the statute. The recent change in California law does not affect jurisdiction over this action. Moreover, the Court of Appeals properly concluded that the joinder of parties sought by Cory and Alvord was unnecessary and that transfer of the case to the District of Colorado under 28 U.S.C. § 1404(a) was unnecessary. The interests of justice, fairness to all parties, and judicial economy call for this Court to uphold federal interpleader as the appropriate vehicle for resolving the issues presented in this action.

ARGUMENT

I. STATUTORY INTERPLEADER JURISDICTION OVER THIS ACTION IS NOT PREEMPTED BY 28 U.S.C. § 1251(a).

Cory and Alvord assert that this action is, in reality, a controversy between two states, and therefore, is subject to the jurisdiction of this Court under 28 U.S.C. § 1251(a). Because this jurisdiction is original and exclusive, the argument goes, the interpleader action will not lie because a federal district court lacks jurisdiction.

This argument proceeds from a false premise—that this is a controversy between two states. In denying the state of California's earlier motion for leave to file an original action, this Court has already rejected the notion that there is a present controversy between two states. As Justice Stewart carefully explained in his concurring opinion, this is not yet a dispute between two states. *California v. Texas*, 437 U.S. at 610-11 (Stewart, J. concurring).

This action in the nature of interpleader pits Lummis, as interested stakeholder, against the adverse claims of White and Bullock, on the one hand, and of Cory and Alvord, on the other. While the tax officials' claims are certainly adverse to each other, there is no present "controvers[y] between two . . . States" under 28 U.S.C. § 1251(a). The claimant tax officials have, at present, no cause of action against each other. They cannot, of course, sue each other to recover the death taxes they contend they are owed. Their only present claims are against the interpleader fund, *i.e.*, the intangible assets of the Estate.

It is only if the intangible assets of the Estate prove insufficient to satisfy the claims by both states that this action would ripen into a controversy between two states. The intangible assets of the Estate cannot be insufficient to satisfy both claims if this interpleader action determines that the tax officials of only one state are entitled to impose a death tax (or neither, if this action determines that Mr. Hughes died domiciled in Nevada). *See California v. Texas*, 437 U.S. at 601-602 (Brennan, J., concurring).

Petitioners have posed the wrong question. The initial question before the Court is not whether this case is a controversy between two states, for it clearly is not—at least not yet. As Justice Stewart noted:

> In reality the facts in *Texas v. Florida*, as well as the allegations in the complaint now before us, contain the seeds of two distinct lawsuits. One is a dispute between two States as to the proper division of a finite sum of money. The other is a suit in the nature of interpleader to settle the question of a decedent's domicile for purposes of the taxes to be imposed upon his estate. But the suit in the nature of interpleader is not within the original and exclusive jurisdiction of this Court because it is not a dispute between States. (*California v. Texas*, 437 U.S. at 610-11)

The question then is whether this dispute over Mr. Hughes' domicile is capable of being resolved under the Federal Interpleader Act. For if it is, then there will be no controversy between the states.

II. STATUTORY INTERPLEADER IS AVAILABLE TO THIS ESTATE FOR RESOLVING THE THREAT OF MULTIPLE DEATH TAXATION.

On November 10, 1977, the state of California filed a motion for leave to file a complaint in this Court seeking to invoke the Court's original jurisdiction.[7] In both its briefs and in oral argument, California relied heavily on *Texas v. Florida*, 306 U.S. 398 (1939), claiming that the situation facing the Hughes Estate, in which two states assert conflicting claims of domicile and threaten with their tax assessments to exhaust the assets of the Estate, was identical to that presented in *Texas v. Florida*.

This Court, however, did not find *Texas v. Florida* controlling and denied California's motion for leave to file an original action. Justice Stewart, in a concurring opinion, carefully explained that the problem facing both the estate in *Texas v. Florida* and the Hughes Estate was not a conflict between the states themselves which would provide the basis for the exercise of the Court's original and exclusive jurisdiction, but rather was a conflict between the Estates on the one hand and the competing states on the other. *California v. Texas*, 437 U.S. at 611 (Stewart, J., concurring).

---

7. Prior to that date, the Estate and the state of California had concluded a provisional settlement agreement of the California domicile claim. This matter was brought to the Court's attention as an appendix to the brief of the State of Texas and in oral argument in that action. The provisional agreement was expressly conditioned upon the Court's accepting jurisdiction over that action, a condition which was not fulfilled because the motion for leave to file the bill of complaint was denied by the Court on June 22, 1978. Since the commencement of the present interpleader action, Lummis and the California and Texas tax officials have been actively adverse to each other.

The concurring opinions in *California v. Texas* provided an alternative to the dilemma, however, in suggesting that the remedy of federal interpleader is available to the Hughes Estate. The concurring Justices noted that the Eleventh Amendment, which had been considered a bar in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), was no longer an obstacle because of the Court's more recent interpretation of the Eleventh Amendment in *Edelman v. Jordan*, 415 U.S. 651 (1974). In concluding that a federal interpleader action is available to the Hughes Estate, Justice Stewart noted Professor Chafee's recognition of the problem created by *Worcester County*:

> It is, [Professor Chafee] observed, "highly unfair for both state governments to tell the taxpayer, 'You have to pay only one tax,' and then make him pay twice." [citation omitted] He pointed out that the paradox of inconsistent adjudications of a theoretically single domicile is one created by our federal system of government: "In a nation with a unified government, the situation in which estates of decedents are here left remediless would be impossible. Either only one agency would impose death taxes, or else a single court of review would determine domicile as between two local taxing agencies. . . . Somewhere within that federal system we should be able to find remedies for the frictions which that system creates." [citation omitted] I believe such a remedy is now available. See n. 10, *infra*. (*California v. Texas*, 437 U.S. at 608, n. 9)

Petitioners Cory and Alvord, however, contend that what Chafee really meant was that the remedy can come only through "legislative solution," and that this Court

should not indulge in "judicial rewriting" of an "unambiguous" statute (Pet. Br. at 47). Lummis agrees that the Federal Interpleader Act is unambiguous, but cannot agree that, by its silence on the issue, the statute was designed to exclude state officials from its scope. It is *Worcester County's* holding, that the Eleventh Amendment was a bar to interpleader actions against state tax officials, that is in issue here. As will be shown below, this Court has, through interpretation of the Eleventh Amendment subsequent to *Worcester County*, already provided the basis for holding that it has no application when only prospective relief is sought against a state official.

III. THE ELEVENTH AMENDMENT DOES NOT BAR THIS INTERPLEADER ACTION.[8]

A. This Action Invokes the *Edelman v. Jordan* Doctrine of Prospective Relief.

The Eleventh Amendment was passed in 1794 in reaction to the holding in *Chisholm v. Georgia*, 2 U.S. (2

8. In their Brief in the Court of Appeals and in argument before that Court, Cory and Alvord abandoned the Eleventh Amendment defense which they had asserted in the district court. In fact, at oral argument before that Court, Counsel for Petitioners, Mr. Falk, agreed in principle that federal interpleader is proper in this case:

> MR. FALK: No, we don't want to play any procedural game. And I understand why the result [dismissal of the interpleader suit by the district court] in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act.

(Transcript, Oral Arguments, March 31, 1980, at 19)

This abandonment and waiver continued into their Petition for Certiorari in this Court. Although the Eleventh Amendment "partakes of the nature of a jurisdictional bar," it is equally clear that

Dall.) 419 (1793), that a private individual could sue a state in the Supreme Court for recovery of a debt. Thus the Amendment was intended from the outset to protect state treasuries against collection of state debts. It has, however, historically been the rule that state officials alleged to be acting unconstitutionally or otherwise illegally may not assert the Eleventh Amendment as a bar to actions brought against them. *Ex parte Young*, 209 U.S. 123 (1908); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In each of these cases, the relief sought was prospective in nature; but the Court, in holding that the actions were not barred by the Eleventh Amendment, focused on the allegations of wrongdoing, rather than on the relief sought against the officials, in "stripping" the officials of their Eleventh Amendment immunity. The Court continued its examination of wrongdoing by state officials in *Worcester County* and held that because there was no constitutional impediment to double taxation, the action was barred by the Eleventh Amendment.

The Court began to shift its focus from allegations of wrongdoing to the nature of the relief sought in *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945), which held that when "the action is in essence one for the recovery of money from the state, the

---

it may be waived. *Edelman v. Jordan*, 415 U.S. at 678; 12 MOORE'S FEDERAL PRACTICE § 300.03[3.-5] (1981). Having thus been waived, this issue is not properly before the Court. Rules 21.1(a) & 34.1(a), SUPREME COURT RULES. Nevertheless, since the issue has been presented in the Brief for Petitioners, Lummis must reply, subject to his claim that the purported Eleventh Amendment defense by Cory and Alvord has, indeed, been waived.

state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suits even though individual officials are nominal defendants." The Court held that the Eleventh Amendment was a bar to the retroactive relief sought there. In *Edelman v. Jordan*, 415 U.S. 651 (1974), however, the plaintiff sought both retroactive and prospective relief. Thus the Court was afforded the opportunity to explain the retroactive relief —prospective relief dichotomy: "This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion." (415 U.S. at 670-71) This Court held that if the relief sought is prospective in nature and does not seek retroactive relief, *i.e.*, payment of funds from the state treasury, the suit does not fall within the prohibition of the Eleventh Amendment. The shift in focus from wrongdoing to relief having been completed, cases subsequent to *Edelman* have dealt with the Eleventh Amendment issue on the basis of the relief sought. *See Quern v. Jordan*, 440 U.S. 332 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Maria Santiago v. Corporacion de Renovacion*, 554 F.2d 1210, 1212 (1st Cir. 1977).

Edelman, significantly, did not discuss the concept of "stripping" officials of their Eleventh Amendment immunity but rather focused on the nature of the relief sought. While the allegation of wrongdoing, under 28 U.S.C. § 1331 and § 1343(a)(3) and (4), provided the plaintiff with federal subject-matter jurisdiction, there is no suggestion that these allegations provided the foundation for the Court's resolution of the Eleventh Amendment issues. It is by no means certain then, particularly since

Edelman, that allegations of unconstitutionality or other illegality are necessary to prevent an official from cloaking himself with an Eleventh Amendment defense if an action seeks only prospective relief.

The concurring opinions in *California v. Texas* reaffirm the *Edelman* holding that it is the nature of the relief sought that is determinative of whether the Eleventh Amendment is a bar. Those opinions seem to suggest that allegations of unconstitutionality or other illegality may not be necessary in this interpleader action which seeks only prospective relief against state officials. Nonetheless, if this Court is of the opinion that such allegations are still required after *Edelman*, substantial allegations are contained in Lummis' Complaint and are discussed in Section III, B and C, *infra*.

Finally, it must also be recognized that interpleader, as an equitable remedy, contemplates, by its very nature, a unique type of "wrongdoing" and fashions an appropriate remedy. The wrongdoing intended to be remedied by statutory interpleader is the refusal of two or more adverse claimants to submit their claims against the fund to the jurisdiction of one court and the concomitant threat to the stakeholder of vexatious litigation and multiple liability on a single obligation. *See* 3A Moore's FEDERAL PRACTICE § 22.02[1] (1978). The remedy fashioned permits the stakeholder to interplead the adverse claimants, thus subjecting them to the jurisdiction of the federal court, in order to obtain prospective relief that binds them in a single adjudication and eliminates the threat of multiple liability on a single obligation.

B. This Action Alleges Unconstitutional Activity By The Tax Officials.

The Eleventh Amendment provides no immunity from suit for officials who are alleged to be engaging in unconstitutional activity. The tax officials of Texas and California assert that a judgment rendered in the courts of either state is not binding upon the tax officials of the other state if they are not parties to the other suit. Yet Cory and Alvord and White and Bullock have resisted a unitary adjudication in this action, thus depriving the Estate of constitutional due process as enunciated in *Western Union Tel. Co. v. Pennsylvania,* 368 U.S. 71 (1961).[9]

In *Western Union,* the telegraph company was threatened by two states seeking to escheat unclaimed intangible funds held by it. The company claimed no right to the fund but did not want to pay the money to one state, without some guarantee that the other state would not attempt, as it threatened, to collect a similar amount. In holding that Pennsylvania's effort to escheat the unclaimed funds was a denial of due process, the Court reasoned:

> And our prior opinions have recognized that when a state court's jurisdiction purports to be based, as here, on the presence of property within the state, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claim-

9. This conduct also gives rise to Lummis' claim under 28 U.S.C. § 1331.

ant who is not bound by the first judgment. (*Id.* at 75)[10]

Western Union is closely parallel to this interpleader action with its present composition of parties. In *Western Union*, the company holding the intangible fund did not want to pay money to one state, without some guarantee that the other state would not attempt, as it threatened, to collect the same fund. Both states were basing their right to collect the fund on the principle that the fund was "located" in the state. This same fiction, that intangible assets are "located" within the state of a decedent's domicile, serves as the jurisdictional basis for assessment of death taxes against the estate of a decedent.

Western Union held that due process requires more than that just due procedure be given when property is taken. This Court said that the due process clause of the Fourteenth Amendment prohibits a state from instituting proceedings aimed at taking a stakeholder's property unless the state can also protect that person from being ordered by another state to pay the same obligation a second time. 368 U.S. at 75. Here neither set of tax officials should be permitted to take property from this

10. Cory and Alvord contended in the Court of Appeals that *Western Union* is distinguishable from this case, and relied on *California v. Texas* in support of that assertion. *Western Union* is properly distinguishable from *California v. Texas*, but only because in *Western Union* the aggrieved stakeholder, the Western Union Company, was before the Court. In *California v. Texas*, the aggrieved party and stakeholder, the Estate, was not before the Court. It is not surprising therefore that Justice Stewart believed that the "situation in which [*California v. Texas*] arises is quite different [from *Western Union*]." (*California v. Texas*, 437 U.S. at 612, n. 13)

Estate unless they can also protect it against liability from the other's domicile-based claim.[11]

A second constitutional violation exists because the Texas and California tax officials' attempts to collect domicile-based death taxes on the same intangible assets of the Estate impermissibly penalize the Estate for Mr. Hughes' exercise of his constitutionally protected right to travel. A right of action to seek redress of this deprivation exists under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (a)(3).

The right to travel has a long history of protection and recognition by this Court. *United States v. Wheeler*, 254 U.S. 281 (1920); *Twining v. New Jersey*, 211 U.S. 78 (1908); *William v. Fears*, 179 U.S. 270 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Passenger Cases*, 48 U.S. (7 How.) 282 (1849). In its most notable treatment in recent times, the Court, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), stated:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regula-

11. The situation confronting the Western Union Company and this Estate is different from that involved in *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174 (1942), in which the Court permitted both the state of domicile (New York) and the state of incorporation (Utah) to impose taxes upon the transfer at death of shares of stock that were part of the decedent's estate. *Aldrich* allowed the imposition of death taxes by two states only because each had a *different* jurisdictional basis for doing so. In the present case, by contrast, this Estate is faced with claims by two sets of tax officials who are basing their authority to tax on *identical and mutually exclusive jurisdictional bases.*

> tions which unreasonably burden or restrict this movement. (*Id.* at 629)

The right to travel is well-established in our federal system, and state officials may not impose penalties or undue restrictions upon the exercise of that right. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Harman v. Forssenius*, 380 U.S. 528 (1965). It is beyond dispute that Mr. Hughes' exercise of his right to travel is being penalized under the facts of this case. Mr. Hughes, as is becoming increasingly common in our society, chose not to reside for his entire lifetime in only one jurisdiction. However, because of the exercise of his right to travel, his Estate faces the penalty of costly, repetitious, and unwarranted litigation because of multiple claims and multiple liability based on a single obligation.

The impermissible assessment of domicile-based death taxes on the Estate's intangibles by both the Texas and California tax officials, when combined with the federal estate tax, will consume the entire Estate. Such a result is an intolerable penalty upon one's exercise of his right to travel, because "state[s] may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).[12]

---

12. The proper party to assert Mr. Hughes' right to travel is his personal representative Lummis. If Mr. Hughes' personal representative were not permitted to assert his right on behalf of Mr. Hughes, the Estate would face the specter of total depletion by state and federal taxation. The injury, therefore, is to the Estate and the injury "in fact" requirement for assertion of constitutional rights is satisfied. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Flast v. Cohen*, 392 U.S. 83 (1968). Because it is now impossible for Mr. Hughes to assert this right, his personal rep-

Cory and Alvord contended in the Court of Appeals that Mr. Hughes, as a "multinational recluse," is himself to blame for the threat of double taxation of the intangible assets of his Estate. If Mr. Hughes is responsible for the dilemma in which his Estate finds itself, it is a responsibility without blame because he is constitutionally permitted to travel without fear that his exercise of this right will result in a penalty being imposed upon his Estate. *See Shapiro v. Thompson, supra.*

C. This Action Alleges Other Illegal Activity By The Tax Officials.

It has long been held that even if the statute under which an official is acting is not alleged to be unconstitutional, he may nevertheless be sued as an individual if his actions are alleged to be outside the parameters of the statute and therefore illegal. *Poindexter v. Greenhow,* 114 U.S. 270 (1885). The Court defined this principle in *Reagan v. Farmers' Loan & Trust Co.,* 154 U.S. 362 (1894):

> Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an

---

resentative may do so to protect property rights that were vested in Mr. Hughes, and at the time of his death, vested in his personal representative. *See Barrows v. Jackson,* 346 U.S. 249 (1953).

> illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. (154 U.S. at 390-91)

See also Greene v. Louisville & I. R. Co., 244 U.S. 499 (1916).

Like the plaintiff in *Reagan*, Lummis does not challenge the constitutionality of the statutes under which the tax officials of Texas and California seek to proceed. Because he alleges that Mr. Hughes died domiciled in Nevada, Lummis does however challenge the legality of their attempts to assess death taxes against the intangible assets of this Estate under the death tax statutes of Texas and California.

As the Court of Appeals correctly noted, "Under the common law of Texas as well as that of California, a decedent has only one domicile for death tax purposes. *California v. Texas*, 437 U.S. at 603, 98 S.Ct. at 3109 (Stewart, J., concurring); *see Texas v. Florida*, 306 U.S. at 408, 59 S.Ct. at 568." (Pet. App. at 12a). Texas and California law both provide that the intangible property to be taxed be within the jurisdiction of the state, *i.e.*, the property of a domiciliary decedent. TEX. TAX.—GEN. ANN. art. 14.01 (Supp. 1978); CAL. REV. & TAX. CODE § 13303(a) and 13401 (1970). According to the law of each state, neither set of tax officials has authority to collect a domicile-based death tax if Mr. Hughes was not domiciled in their state at death.

In deciding issues of jurisdiction, federal courts accept as true all well-pleaded allegations of the Complaint.

Scheuer v. Rhodes, 416 U.S. 232 (1974); *Cruz v. Beto*, 405 U.S. 319 (1972). The application of the law of each state to the well-pleaded fact that Mr. Hughes was domiciled in Nevada at death results in the conclusion that the attempts by each state's tax officials to assess domicile-based death taxes upon the intangibles of the Estate are illegal.[13] Under *Reagan* and *Greene*, the unlawful activity of the tax officials, in attempting to collect domicile-based taxes from the Estate, removes the officials from the protective scope of the Eleventh Amendment and makes them personally amenable to this interpleader action.

D. This Action Is Distinguishable From The Holding In *Worcester County Trust Co. v. Riley*.

Even if *Worcester County* is considered by the Court to still be viable, it should not control the disposition of this interpleader action because the two cases are distinguishable.[14] In the present interpleader, Lummis has

---

13. Cory and Alvord maintained in the Court of Appeals that they are merely making "good faith" assertions as to domicile in order to collect death taxes against the Estate. They maintain that as officials of the state they have the authority to make a decision as to domicile and that their "good faith" efforts to collect taxes based on that decision cannot amount to illegal activity. "Good faith" assertions by the state tax officials do not in themselves deprive a federal district court of jurisdiction. Were this the law, no plaintiff would be able to call into question any activities of a state official if the official could raise as a defense the assertion that he is acting in good faith. Certainly nothing in the judicial interpretation of the Eleventh Amendment calls for such a conclusion and common sense dictates to the contrary.

14. While *Worcester County* was recently cited in *Alabama v. Pugh*, 438 U.S. 781 (1978), it was cited for the proposition that a suit could not be maintained against the State of Alabama and its

alleged his good faith belief that Mr. Hughes died domiciled in Nevada and that the claims of *both* sets of tax officials are without merit and that their actions are without any valid legal authority. By contrast, as noted in the First Circuit opinion in *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir. 1937), the plaintiff could not allege that both sets of officials were acting illegally because he conceded that the decedent was domiciled in one of the two states. If only one set of officials was acting illegally and therefore could be sued as individuals, the other set would still be acting lawfully and as representatives of the state, with Eleventh Amendment protection. The First Circuit said:

> It is also to be noted that *neither one nor both of the respondents*, as tax officials of the respective states, *are charged with acting in violation of the laws of their respective states. . . . (Riley v. Worcester County Trust Co.*, 89 F.2d 59, 65 (1st Cir. 1937)) (Emphasis added.)

In this Court, Justice Stone made the same observation:

> Petitioner does not contend that respondents, the California officers, propose to do more than invoke the action of its courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in California as the basis of its power to impose the tax. (*Worcester County Trust Co. v. Riley*, 302 U.S. at 298-99)

Unlike the plaintiff in *Worcester County*, Lummis here alleges unconstitutional and other illegal activity

---

Board of Corrections. Injunctions issued *against the state officials*, however, were allowed to remain in effect. *Alabama v. Pugh*, in this respect, is a reaffirmation of the holding in *Edelman*.

on the part of both sets of state tax officials, because Mr. Hughes died domiciled, not in Texas or California, but in Nevada. Under Texas and California law, a tax official has no authority to collect domicile-based taxes unless the decedent is domiciled in the state at death. This case is therefore distinguishable from *Worcester County* because the deficiencies noted by the courts in *Worcester County* do not exist here.

IV. THE REQUIREMENTS FOR STATUTORY INTERPLEADER, ADVERSITY AND DIVERSITY, ARE SATISFIED IN THIS ACTION.[15]

A. The Tax Officials Are "Citizens Of Different States" For Purposes Of Interpleader Jurisdiction.

Cory and Alvord and White and Bullock admit that their individual citizenships are those of California and Texas respectively (A. 85, 92, 79, 82). The Court of Appeals did not find it necessary to rely on the diversity of their citizenship, having found the requisite minimal diversity to exist between Lummis and Alvord. (See Section IV, B, *infra.*) Cory and Alvord, however, contend that their citizenship may not be considered for diversity purposes because they function as officials of the state and, their argument goes, a state is not a citizen of itself.

However, in considering whether a suit against a state official is properly brought, the key inquiry is whether

15. Adversity is not in issue here because all parties concede that the claims asserted by Cory and Alvord, White and Bullock, and Lummis are adverse to each other.

the state official is the real party in interest. *Quern v. Jordan*, 440 U.S. 332, 345, n. 17 (1979), citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). If a suit seeks money damages from a state treasury, the state is the real party in interest and, unless waived or overridden by congressional enactment, the suit will be barred by the Eleventh Amendment. *See Ford Motor Co. v. Dept. of Treasury of Indiana, supra.* On the other hand, if the suit seeks only injunctive and declaratory relief, as here, the state is not the real party in interest, the Eleventh Amendment is no bar and the state officials should be regarded as individuals, as all other defendants are. *See Edelman v. Jordan, supra.*

The starting point in analyzing whether jurisdiction exists over any person for diversity purposes is that he is a citizen of the state in which he resides. U. S. CONST. amend. XIV, § 1. If a defendant state official wants to avoid suit as a citizen of his state, he must show that the state is the real party in interest in the suit in order to cloak himself with the state's Eleventh Amendment protection. But under *Ford Motor* and *Edelman*, the state is not the real party in interest if the suit seeks only prospective and not retroactive relief. The suit is either against the state or it is not. If it is not, the state official does not enjoy any Eleventh Amendment immunity from suit. Like any other citizen of a state, his citizenship may be looked to for diversity purposes.[16]

This analysis has permitted federal courts to look to the citizenship of state officials in instances where there

16. The Fourteenth Amendment defines an individual's citizenship: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

have been allegations of unconstitutional or other illegal activity. For example, in *Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717, 718 (5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970), the Fifth Circuit held that "the federal court has jurisdiction . . . under diversity of citizenship, 28 U.S.C. § 1332, in that the [Louisiana] collector [of Revenue] is acting unconstitutionally and therefore in an individual capacity and not as the official representative of the State of Louisiana. . . ." *Accord, Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds, sub nom., Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *State of Ohio ex rel. Seney v. Swift & Co.*, 270 F. 141, 151 (6th Cir.), *cert. denied*, 257 U.S. 633 (1921); *State Life Insurance Co. v. Daniel*, 6 F. Supp. 1015 (W.D. Tex. 1934).

The principle that the citizenship of state officials may be considered for diversity purposes is equally true in cases that do not involve the Eleventh Amendment. In *Ex parte Nebraska*, 209 U.S. 436 (1908), a removal action, the Court held that diversity existed between the state officials of Nebraska and a non-resident corporation, and even the naming of the state as a party did not in itself defeat diversity jurisdiction where the state was not the real party in interest.[17]

---

17. By further analogy, the sovereign immunity of the federal government presented no obstacle and the individual citizenship of the Attorney General of the United States provided a basis for original jurisdiction in a suit brought to enjoin the enforcement of certain provisions of the Voting Rights Act of 1965. The Court based its finding of original jurisdiction on "the presence of a controversy between a state [South Carolina] and a citizen of another state [the Attorney General, a citizen of New York] under Art. III § 2 of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

Cory and Alvord cite cases for the proposition that the citizenships of state officials cannot be looked to for diversity purposes (Pet. Br. at 27, n. 35). These cases are inapplicable to this action, because either (1) the state officials were suing as plaintiffs and the state was found to be the real party in interest,[18] or (2) retroactive monetary damages were sought,[19] or (3) the action was held to be a violation of 28 U.S.C. § 1341 because a plain, speedy and efficient remedy was available in the state court,[20] or (4) there was no allegation of unconstitutional or other illegal activity on the part of the state officials who were parties to the suits.[21] In *Riley v. Worcester County Trust Co.*, the plaintiff had failed to allege that any official was acting without legal warrant. Taking note of this defect, the First Circuit said,

---

18. *People ex rel. McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942); *Craig v. So. Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942); *Robertson v. Ingram-Day Lumber Co.*, 271 F. 1023 (5th Cir. 1921); *Robertson v. Jordan River Lumber Co.*, 269 F. 606 (5th Cir. 1921); *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D. S.C. 1943).

19. *State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1928).

20. *Kansas City Southern R. R. Co. v. Morley*, 88 F. Supp. 300 (W.D. Ark. 1950). The prospect of multiple state taxation was precisely the issue which led the court, in *U. S. Steel Corp. v. Multistate Tax Comm'n*, 367 F. Supp. 107, 115 (S.D. N.Y. 1973), to hold that section 1341 was not a bar to that action: "The reference to 'such state' in § 1341 clearly indicates that the statute contemplated that the taxing authority of only one state be involved. . . ." This prospect of multiple taxation effectively removes the present action from the ambit of section 1341, a factor noted by Justice Stewart in *California v. Texas*, 437 U.S. 608 at n. 10.

21. *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir.), *aff'd*, 302 U.S. 272 (1937).

> If there was such an allegation with respect to the determination of domicile by both sets of officials, *they could be regarded as sued as individuals*, (emphasis added) for the acts which they would be charged with having done would be in violation of law, unless it could be said from a consideration of the complaint as a whole that the *relief sought* was against the states, and not the officials personally. (*Id.* at 65)

As noted above, cases since *Worcester County* have made it clear that prohibited "relief sought" is retroactive relief, whereas prospective relief is permissible. Therefore the rule that a state is not a citizen of itself has no application here and the citizenships of the tax officials are relevant for diversity purposes.

B. The Court Of Appeals' Finding Of Minimal Diversity Is Correct.

1. Diversity Exists Between Lummis, As Interested Stakeholder (A Citizen Of Nevada) And Alvord, Treasurer Of Los Angeles County (A Citizen Of California).

The Court of Appeals properly found that the remedy of statutory interpleader is available to Lummis because the requisite adversity and diversity exist between two of the claimants to the fund in this case: (1) Lummis, the interested stakeholder who is a citizen of Nevada, and (2) H. B. Alvord, the County Treasurer of Los Angeles who is a citizen of California.

Cory and Alvord claim, as they did in the Court of Appeals, that the citizenship of an interested stakeholder

may not be looked to for diversity purposes because it has never been done before, and to do so might lead to an unwarranted or undesirable expansion of federal jurisdiction. In holding that the citizenship of an interested stakeholder may be considered for purposes of establishing diversity under Section 1335, the Court of Appeals was deciding an issue of first impression.[22] Its ruling, however, is consistent with the line of cases in which this Court has interpreted the interpleader statute liberally in order to foster its use as an equitable remedy. *See, e.g., State Farm Fire & Cas. Co. v. Tashire, supra; Treinies v. Sunshine Mining Co., supra. See also Haynes v. Felder,* 239 F.2d 868 (5th Cir. 1957); *Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477, n. 8 (E.D. La. 1960); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1710, at 406 (1972) (hereinafter "WRIGHT").

In *California v. Texas,* Justice Stewart, in defining the role of an interested stakeholder, indicated that the stakeholder bringing a bill in the nature of interpleader is an interested claimant:

> In true interpleader the stakeholder bringing suit asserts no interest in the fund. The bill in the nature of interpleader, by contrast, allows an interested claimant to seek adjudication of all claims to the

---

22. The Court in *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939) did address the issue of considering the citizenship of a stakeholder for diversity purposes. However, it involved a disinterested stakeholder and the issue of whether an interested stakeholder's citizenship can be used to satisfy minimal diversity remained open. *See also State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967).

fund including his own. 437 U.S. at 605, n. 5 (1978), citing *Texas v. Florida*, 306 U.S. 398, 406 (1939).[23]

Since, by this definition, Lummis qualifies as a claimant it logically follows that he qualifies as a claimant for all purposes because the interpleader statute does not draw distinctions among claimants.[24] The Court of Appeals properly concluded that Lummis was an interested stakeholder, and therefore an interpleader claimant, because as administrator he has a legal duty to preserve the assets of the estate and to protect those assets against double death tax liability, because he asserts that Mr. Hughes died domiciled in Nevada and because he stands to collect an administrator's fee (Pet. App. at 10a).

Unable to successfully attack Lummis' status as a claimant, Cory and Alvord raise the specter that the finding will have radical effects upon federal jurisdiction.

---

23. The Court of Appeals defined the interested stakeholder's role in the same manner, "A stakeholder who brings a bill in the nature of interpleader asserts a claim to the fund that is adverse to that of the defendant claimants." (Pet. App. at 10a-11a)

24. As Professor Wright explains:

> [O]nce an interested stakeholder deposits the fund with the court or posts an appropriate bond, he does become a claimant for all practical purposes and his citizenship should be relevant in deciding the jurisdiction question. Moreover, since by hypothesis, the stakeholder's citizenship will be diverse from that of at least one of the claimants, the interpleader has interstate aspects and therefore seems to fall within the class of cases intended to be covered by the statute. (14 WRIGHT, § 3636 at 73 (1976))

What has been suggested to be a contrary view appears at 3A MOORE'S FEDERAL PRACTICE, § 22.09[1] (1979). An examination of this discussion of the subject, however, reveals that this treatise is providing an historical review of the earlier lower court cases which, in order to sustain jurisdiction, held an interested stakeholder's citizenship irrelevant under statutory interpleader.

They predict that unless this finding is overturned, "nearly every bilateral dispute could be framed to invoke federal jurisdiction. . . ." (Pet. Br. at 30). Federal statutory interpleader, however, is intended to prevent multiple payments to multiple claimants where there is only a single liability, and no state court can obtain jurisdiction over all the parties. Therefore, where a plaintiff [from State A] is holding a "sum of money which is claimed by X [from State B] and X alone" (Pet. Br. at 30), the stakeholder faces a single and not multiple liability. Unless and until the stakeholder is subjected to the threat of vexatious litigation and multiple liability, interpleader is both unavailable and unnecessary. *See, e.g. Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75 (10th Cir. 1955), *cert. denied*, 350 U.S. 986 (1956); *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739 (5th Cir. 1955); *Pan Am. Fire & Cas. Co. v. Revere, supra.*

Similarly, the prediction that undesirable effects will follow from allowing a section 1335 stakeholder-claimant to bring the action in his own district under 28 U.S.C. § 1397 also has a hollow ring. This option is already available to the stakeholder who brings a Rule 22 interpleader based on diversity of citizenship, the most common basis for rule interpleader actions. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. at 528, n. 3; 7 WRIGHT, § 1712 at 425; 28 U.S.C. § 1391(a). Moreover, if the forum chosen by the stakeholder, under statutory or rule interpleader, is truly inappropriate, then defendants in both instances may seek a change of venue under 28 U.S.C. § 1404(a).

These same assertions were vigorously urged by Cory and Alvord in the Court of Appeals. That court was

therefore well aware of these arguments but properly rejected them, relying on the better-reasoned approach:

> The declining importance of the classic limitations on interpleader and the acceptance of jurisdiction based on minimal diversity under the statute are evidence of a trend toward the broadest availability of interpleader relief that has been underway since the adoption of the federal rules. Allowing statutory interpleader [when the defendant claimants are citizens of the same state, but an interested stakeholder is diverse,] would be consistent with that trend. (7 WRIGHT § 1710 at 406 (footnote omitted)) (Pet. App. at 11a, n. 12)

The diversity finding by the Court of Appeals, therefore, as to stakeholder-claimant Lummis is neither unfounded nor fraught with insurmountable problems for the federal judiciary. The Court of Appeals properly considered the citizenships of Lummis and Alvord in holding that the adversity and diversity prerequisites of the interpleader statute are met in this action.

Moreover, even assuming *arguendo*, that the concerns raised by Cory and Alvord of looking to the interested stakeholder's citizenship (Lummis, as Texas Administrator) for diversity purposes are valid, these objections are not applicable to the citizenship of Lummis and First National Bank of Nevada (as Nevada Administrators) because the latter are not stakeholder-claimants. They are not stakeholders because they hold none of the intangible assets which comprise the interpleader fund in this action (Lummis, Test., A. 119). They are, however, adverse to the claims of Cory and Alvord and White and

Bullock, because they claim that Mr. Hughes died domiciled in Nevada and that they, as domiciliary administrators, are entitled to custody and possession of all intangible assets of the Estate undiminished by payment of any state death taxes (A. 99). Any criticism of looking to the interested stakeholder's citizenship for diversity purposes does not, however, apply to the Nevada Administrators, and they, as adverse and diverse claimants, provide yet another basis for sustaining interpleader jurisdiction.

2. The Diversity Finding As To Alvord Is Unaffected By The Recent Change In California Law.

When this action was commenced, California law provided that inheritance taxes were collected by the county treasurer of the county where a decedent was domiciled at death. CAL. REV. & TAX. CODE §§ 14104, 14791, 14793-95. The county treasurer would retain a percentage as a "commission" and would remit the remainder to the state controller. Because this statutory scheme made County Treasurer Alvord a claimant against the intangible assets of the Estate, Lummis named him as a defendant. The district court conceded and the Court of Appeals squarely held that Alvord's citizenship could be considered for diversity purposes, under *Moor v. County of Alameda*, 411 U.S. 963 (1973), *overruled on other grounds, Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Cory and Alvord now claim that a revision in California law, some two and a half years after the suit

was commenced,[25] undoes the diversity finding of the Court of Appeals as to Alvord. However, it has long been held in diversity cases that "jurisdiction of the court depends on the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) (Marshall, J.). Therefore, the fact that the California legislature may have modified the inheritance tax law has no effect on jurisdiction in this case.[26]

Cory and Alvord, seeking to avoid this doctrine, rely on cases involving either (1) the joinder of additional parties, as plaintiffs or defendants, whose presence will destroy diversity (Pet. Br. at 33, n. 41-42); or (2) the dismissal of non-diverse parties, plaintiffs or defendants, whose presence will destroy diversity (*Id.* at 34, n. 43-44); or (3) intervention by parties, indispensable or non-indispensable, again whose presence also destroys diversity (*Id.* at 34, n. 46). This authority is plainly inapposite because here there has been no attempt to join

---

25. Lummis filed this interpleader suit in July, 1978. The legislative change was signed into law on July 1, 1980, some three months before the Court of Appeals handed down its judgment. The revision became effective, for "all estates, on January 1, 1981." It was not until January 16, 1981 that Cory and Alvord brought this change to the attention of the Court of Appeals in their motion for rehearing out of time. This was some two weeks after the court had granted Cory and Alvord's request for a stay of its mandate on the basis that they would file a Petition for Certiorari in this Court.

26. Whatever the motive for the change in the California tax law, the change raises the troublesome problem that, if the general rule is ignored or did not exist, state legislatures could exempt officials from suit in federal court by eradicating or otherwise altering the officials' duties after commencement of an action.

or dismiss or refuse intervention to a party because their presence will destroy diversity.

More fundamentally, their cases are inapplicable because they deal with the application of Rule 19, FED. R. CIV. P. principles to non-diverse parties. As these cases point out, if a non-diverse party is indispensable, the action must be dismissed. On the other hand, if the non-diverse party is found not to be indispensable, that party will be dismissed in order to preserve jurisdiction. In effect, the posture of a case *after* all indispensable parties have been joined, or non-indispensable parties dismissed, is the critical time as far as a determination of diversity jurisdiction is concerned, *because this is the first time at which the case has been structured as it should have been at the time of commencement.*

The statutory change reflects a legislative assignment of Alvord's claim to Cory who now collects the inheritance tax. This change, however, has not altered the nature of this action in any way and therefore does not divest the court of its jurisdiction. *See* 13 WRIGHT, § 3608, at 656 (1975). The underlying bases of Alvord's claim and Cory's claim are the same—that Mr. Hughes died domiciled in California. Controller Cory, of course, continues to assert this claim as before.[27]

---

27. Unlike the situation in *Kennametal, Inc. v. International Union*, 161 F. Supp. 362 (W.D. Pa. 1958), cited by Cory and Alvord, no claim against the fund has been abandoned. This is underscored by the fact that Cory and Alvord do not now contend that the amount they seek to assess against the Estate has been reduced because of the change in law. If Mr. Hughes were eventually adjudged to have died a domiciliary of California, the amount of tax due Alvord (24%) would now be transmitted to his transferee, Cory.

The change in California law merely effected a transfer of interest from Alvord to Cory, a transfer which may be compared to situations where a diverse party's interest shifts to a non-diverse party without affecting diversity jurisdiction. *See Fred Harvey, Inc. v. Mooney*, 526 F.2d 608 (7th Cir. 1975); *accord, Hardenbergh v. Ray*, 151 U.S. 112, 118 (1894). In *Television Reception Corp. v. Dunbar*, 426 F.2d 174 (6th Cir. 1970), the original diverse party assigned his interest to a non-diverse corporation. In finding that the assignment had not destroyed diversity jurisdiction, the court reiterated the general rule that

> federal jurisdiction is tested according to the facts as they exist at the time an action is initiated, and that diversity jurisdiction, once acquired, is not defeated by events occurring subsequent to the commencement of the action. (Citations omitted.) (*Id.* at 177)

See also Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970).

The rule represents a sound policy, one which "provides maximum stability and certainty to the viability of the action and minimizes repeated challenges to the court's subject matter jurisdiction." 13 WRIGHT, § 3608, at 656 (1975). There was no need for the Court of Appeals to reconsider the issue of interpleader jurisdiction. Because diversity jurisdiction was unaffected by the change in California law, Cory and Alvord's petition for rehearing out of time was properly denied.

V. THE FEDERAL DISTRICT COURT, IN THIS INTERPLEADER ACTION, CAN PROVIDE A FAIR AND IMPARTIAL FORUM.

Cory and Alvord assert that the twenty-two signatories to an intrafamily settlement agreement should be joined in this action as necessary parties under Rule 19, FED. R. CIV. P.[28] Lummis asserts that under Rule 17(a), FED. R. CIV. P., the joinder of the heirs is not required and that no good purpose will be served by the addition of twenty-two unnecessary parties. Rule 17(a) provides in pertinent part: "Every action shall be prosecuted in the name of a real party in interest. An executor, administrator . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . ." This rule is an expression of the substantive law that it is the right and duty of the administrator to enforce the rights of the estate because he is the "real party in interest." 3A MOORE'S FEDERAL PRACTICE § 17.12 (1978); 6 WRIGHT § 1543, 1548 (1971). Both the District Court and the Court of Appeals properly concluded that Rule 17 was dispositive of this issue (Pet. App. at 2e, 12a). However, if this Court were to determine that the heirs should be joined as parties, transfer of this action is nevertheless unwarranted.

---

28. The twenty-two persons Cory and Alvord sought to join in this action have now been determined by the Texas probate court to be the heirs-at-law of Mr. Hughes under Texas intestate succession law. Appeals have been taken from this determination by various persons claiming to be heirs. In a separate phase of the Texas probate proceeding, the court has entered judgment against a foundation claiming rights in the Estate under a so-called "lost will." An appeal from this judgment has also been taken. Heirship proceedings are pending in the other Estate administrations.

Lummis properly brought this action in the Western District of Texas where claimants White and Bullock reside. *See* 28 U.S.C. § 1397. Cory and Alvord have sought, since the outset of this action, to elevate what is properly a discretionary question of venue under 28 U.S.C. § 1404(a) to the status of a jurisdictional component of 28 U.S.C. § 1335. This is so even though there has been only speculation, and no showing on their part, that the federal district court in Austin, Texas is not a fair and impartial forum.

They assert that this action would have an adverse impact on state sovereignty because it would be inappropriate to require them to litigate their "tax claim" in a federal district court "sitting in Texas." The district court in Austin, although "sitting in Texas," is nonetheless a federal court. The neutrality that Cory and Alvord seek can be achieved in the present forum, for "the very purpose of federal diversity jurisdiction is [to] avoid bias against parties from outside the forum state." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716, n. 6 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). *Accord*, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 111 (1945).[29]

---

29. Cory and Alvord assume, but again do not establish, that the issue of domicile is triable by a jury and that such a jury, although under the control of a federal judge, would act unfairly. This assertion overlooks the safeguards which the federal court system affords litigants in jury cases. These include the requirement of unanimity of verdict, the power and duty of federal judges to instruct the jury orally and to comment on the evidence, the ability of federal judges to act as authoritative participants in the trial rather than as mere umpires, and the power of federal judges to appoint a master to make findings which could be admitted as evidence to the jury under Rule 53(e)(3), FED. R. CIV. P. *See generally*, SEN. REP. NO. 1830, 85th CONG. 2d SESS., *reprinted in* [1958] CODE CONG. & AD. NEWS 3099, 3118.

Cory and Alvord's motion to change venue rests on unfounded assumptions. The pecuniary interest that is said to disqualify Austin residents as jurors in this case rests on the tenuous claim that each citizen of Texas will individually benefit in the sum of $6.02 if Texas is ultimately determined to be the domicile of Mr. Hughes. However, even the cases cited by Cory and Alvord illustrate that in order for a pecuniary interest in the outcome of the litigation to disqualify a factfinder, the interest must be *direct* and *substantial.*[30] On the other hand, where the factfinder's pecuniary interest is, at best, indirect and speculative, the Court has held that it has no effect on the impartiality of the factfinder. For example, in *Dugan v. Ohio*, 277 U.S. 61 (1928), fines from convicted defendants were paid into a general fund from which the mayor's salary was paid. This statutory scheme did not create a sufficient economic incentive so as to disqualify the mayor from presiding as judge in criminal proceedings. The personal financial benefit, if any, that will accrue to the citizens of Texas if Mr. Hughes is found to be a Texas domiciliary is similarly indirect, remote, and insignificant.

Mere state pride is hardly a sufficient basis for disqualification of a forum's jurors. As the court in *United States v. Haldeman*, 559 F.2d 31, 135-36 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), noted:

---

30. For example, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the judge received a fee for each defendant convicted; in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the mayor also served as village judge and fines levied by him constituted "a major part of village income"; and in *Connally v. Georgia*, 429 U.S. 245 (1977), a justice of the peace received a fee *each time* a search warrant was issued. This Court properly found the *Tumey*, *Ward*, and *Connally* arrangements to be a denial of due process.

> A fundamental premise of our jurisprudential system is that, save in the most extraordinary circumstances, an impartial jury expectably may be convened anywhere in the Nation. Another is that the capability of doing so is always to be presumed until the contrary appears.

Evaluation of possible local bias and prejudice, resulting from the publicity generated *some three years ago* by the Houston domicile trial, is also premature at this time. In *United States v. Haldeman, supra,* a case which generated even greater publicity, the court noted that a pre-*voir dire* determination of the effect of pretrial publicity is, of necessity, subjective in nature:

> A judge reviewing pretrial publicity before the *voir dire* would have to attempt to determine from his own reactions how the community would respond to that publicity. . . . After the *voir dire* a judge can determine which [side's] description of the publicity's impact is accurate; before the *voir dire* a judge can only have guessed. (559 F.2d at 62, n. 37)[31]

Any objective evaluation in this case of the effect of pretrial publicity, regional pride, and pecuniary interest, all of which are subjective factors, must therefore await *voir dire. See United States v. Davis,* 583 F.2d 190 (5th Cir. 1978); *Jones v. Gasch,* 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968).

---

31. The *Haldeman* court, after reviewing the *voir dire,* noted with regard to the impact of the pretrial publicity, "Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." (*Id.* at 62, n. 37)

Further, it should be remembered that Lummis, who is asserting Nevada domicile, will be no less interested than Cory and Alvord in having this case heard and decided by an impartial jury. Contrary to the assertion by Cory and Alvord (Pet. Br. at 10, n. 10), the Estate has a substantial interest in prevailing in its claim of Nevada domicile. From a pecuniary standpoint, the tax liability of the Estate will be appreciably higher if Texas is determined to be the state of domicile than if Nevada is so determined, because the Texas valuation of the intangible assets is greater than that of the federal government. Moreover, Lummis in his duty as administrator has the obligation to urge as the domiciliary state the one that is indicated by his extensive factual investigation.[32]

Changing the venue of this action to Colorado would be a departure from the traditional interpretation of the venue statute that a forum should have sufficient contacts with the litigation to warrant its being litigated in that forum. *See generally Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947). Other than having an heir in residence, the District of Colorado has no connection with this litigation. By contrast, Cory and Alvord could have moved (and could still move, upon a proper showing) for a transfer to the District of Nevada, the residence of claimant

---

32. In an apparent inconsistency, Cory and Alvord assert that Lummis limited the parties in this action to "citizens of the competing states" (*presumably Cory and Alvord and White and Bullock; see* Section IV, A, *supra*) in order to "foreclose transfer to a disinterested forum" (Pet. Br. at 11, n. 11). The lack of substance to their assertion is even more evident when viewed against the attempt by Cory and Alvord to seek transfer to an alternative forum, the Central District of California (an attempt which they now understandably minimize.)

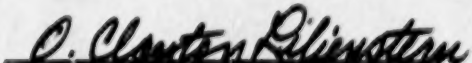
Lummis, a proper transferee forum under 28 U.S.C. §§ 1397 and 1404(a). Nevada not only has a substantial connection with this litigation, but as a state with no death tax, would surely satisfy even Cory and Alvord's notion of an impartial forum.

CONCLUSION

The Court of Appeals properly held that "the federal system that has spawned Lummis' dilemma of double taxation provides him with a remedy." (Pet. App. at 12a) The basic question presented in this action is whether the district court may proceed to determine the merits as to the domicile of Mr. Hughes at death and render an adjudication binding the tax officials and the Estate Administrators so that the Estate may discharge its tax liability once and not multiple times. Simple justice answers affirmatively and Federalism concurs. Federal interpleader furnishes the mechanism.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,



O. CLAYTON LILIENSTERN*
PATRICIA A. STEVENSON
ANDREWS, KURTH,
CAMPBELL & JONES
2500 Exxon Building
Houston, Texas 77002
(713) 652-2412

R. JAMES GEORGE, JR.
JOHN M. HARMON
GRAVES, DOUGHERTY,
HEARON & MOODY
2300 Austin National Bank
Tower
Austin, Texas 78701
Attorneys for Respondent, William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr., Deceased.

*Counsel of Record

Of Counsel:

PROFESSOR
JAMES WILLIAM MOORE
New Haven, Connecticut

Office - Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS, CLERK

No. 80-1556

In the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH CORY, CONTROLLER OF THE STATE OF CALIFORNIA and H. B. ALVORD, COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

vs.

MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners' Reply Brief

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, CA 94108
(415) 434-1600

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8422
Attorneys for Petitioners

Of Counsel:
MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Tax Administration
Office of the State Controller
State of California

*Counsel of Record

BORG PRINTING COMPANY OF CALIFORNIA, 948 FIRST STREET, SAN FRANCISCO 94108

TABLE OF CONTENTS

Page

Table of Authorities ii

Introduction 1

I. The District Court Lacks Jurisdiction Because This Is a "Controvers[y] Between Two . . . States" (28 U.S.C. § 1251(a)) 3

A. This Is a Controversy Between Two States 3

B. Section 1251(a) Is Not Avoided by the Device of Naming State Officers as Defendants Where the States Are Real Parties in Interest 6

1. The Fiction of Ex Parte Young Is Irrelevant to the Issue of Exclusive Jurisdiction Under Section 1251(a) 6

2. The Defendant Officials Have Not Acted Unconstitutionally 9

II. This Action Is Barred by the Eleventh Amendment 15

III. The Elimination of One of the Two "Claimants" Destroys the Jurisdictional Basis Found by the Court of Appeals 18

TABLE OF AUTHORITIES CITED

Cases	Pages
Ashwander v. TVA, 297 U.S. 288 (1936)	2
Beck v. Washington, 369 U.S. 541 (1962)	11
Bishop v. Wood, 426 U.S. 341 (1976)	11
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)	11
California v. Texas, 437 U.S. 601 (1978)	3, 8, 12, 13, 16
Central Land Co. v. Laidley, 159 U.S. 103 (1895)	11
Cox v. Pabst Brewing Company, 152 Kan. 375, 103 P.2d 871 (1940)	15
Desert Empire Bank v. Insurance Company of North America, 623 F.2d 1371 (1980)	18
Edelman v. Jordan, 415 U.S. 651 (1974)	7, 9, 10, 15, 16, 17
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917)	11
Ex parte New York, 256 U.S. 490 (1921)	17
Ex parte Public National Bank, 278 U.S. 101 (1928)	7
Ex parte Young, 209 U.S. 123 (1908)	6, 7, 8, 9, 13, 17
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	2
Ford Motor Co. v. Treasury Department, 323 U.S. 459 (1945)	16
General Atomic Co. v. Duke Power Co., 553 F.2d 53 (10th Cir. 1977)	4
Gentle v. Lamb-Weston, Inc., 302 F. Supp 161 (D. Maine 1969)	19
Great Western United Corp. v. Kidwell, 557 F.2d 1256 (5th Cir. 1978)	8
Gryger v. Burke, 344 U.S. 728 (1948)	11
Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913)	7
Hutto v. Finney, 437 U.S. 678 (1978)	2

Pages

Investors Diversified Services, Inc. v. Bruner, 366 S.W. 2d 810 (Tex. Civ. App. 1963) 15

Katzenbach v. Morgan, 384 U.S. 641 (1966) 2
Kramer v. Caribbean Mills, 394 U.S. 823 (1969) 19

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) 2, 8
Linkerhoker v. Weinberger, 529 F.2d 51 (4th Cir. 1975)..... 16
Lummis v. White, 629 F.2d 397 (5th Cir. 1980) 10

Maryland v. Louisiana, ... U.S. .... , 49 U.S.L.W. 4383 (1981) 8
Monaco v. Mississippi, 292 U.S. 313 (1934) 2

Nevada v. Hall, 440 U.S. 410 (1979) 8
New Jersey v. New York, 345 U.S. 369 (1953) 5
New York v. New Jersey, 256 U.S. 296 (1921) 5
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 2

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 7

Pacific American Gasoline Co. of Texas v. Miller, 61 S.W. 2d 1024 (Tex. Civ. App. 1933) 15
Phoenix Mutual Life Insurance Co. v. Reich, 75 F. Supp. 886 (W.D. Pa. 1948) 6
Picquet v. Amoco Production Co., 513 F. Supp. 938 (M.D. La. 1981) 19

Scheuer v. Rhodes, 416 U.S. 232 (1974) 17
Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1949) ... 2
State Water Control Board v. Washington Suburban Sanitary Comm'n, 61 F.R.D. 588 (D.D.C. 1974) 5

Pages

Stratton v. St. Louis Southwestern Railway, 282 U.S. 10 (1930) 7
Stump v. Starkman, 435 U.S. 349 (1978) 7

Texas v. Florida, 306 U.S. 398 (1939) 5, 8, 11

Vincent V. Penrod Drilling Co., 372 So. 2d 807 (La. App. 1979) 15

Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 12, 13
Wilentz v. Sovereign Camp, W.O.W., 306 U.S. 573 (1939) 7
Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971) 16
Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937) 9, 10, 11, 12

STATUTES AND REGULATIONS

Economic Recovery Act of 1981 § 402, Pub. L. 97-34 8
F.R. EVID. 401 20
F.R. EVID. 201 20
36 Stat. 557 (1910) 7
28 U.S.C. § 1251(a) ..... passim
28 U.S.C. § 1335 ..... 13, 18
28 U.S.C. § 1359 19

OTHER AUTHORITIES

5 AM. JUR. 2d, *Appearance* § 5 (1975) 15
6 C.J.S. *Appearance* § 4 (1979) 15
3A MOORE'S FEDERAL PRACTICE ¶ 27.14(1) 4, 16, 19
TRIBE, AMERICAN CONSTITUTIONAL LAW 144 ..... 6-7, 17
7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1714 ..... 5, 6

Petitioners' Reply Brief

INTRODUCTION

In opposing the Petition for Certiorari, Texas asserted that the "Federal Interpleader Act . . . supersedes the very general exclusivity provision of section 1251(a)(1) [sic] and creates district court jurisdiction over this action in the nature of interpleader." Tex. Br. in Opp. 13-14. We dealt with that suggestion at length in our opening brief, which showed that Congress did not intend to create any such exception to the Court's exclusive jurisdiction over controversies between states. *See* Pet. Br. 19-25. Appropriately, neither of Respondents' briefs on the merits pursues that line of argument, and we presume that it has been abandoned. Instead, two other arguments have been advanced, which we shall discuss in turn.

The Estate argues that this action is not a controversy between states and thus that interpleader jurisdiction is not barred by 28 U.S.C. § 1251(a). As we shall show in Part I(A), *infra*, that argument ignores the reality of this case—in which California and Texas are adversaries in every sense of the word. The remarks of Justice Stewart on which the Estate relies were addressed to very different circumstances.

Texas argues that if the Court rejects its contention that the Eleventh Amendment bars this suit, it follows that a statutory interpleader suit would not infringe the exclusive jurisdiction given this Court over controversies between states because "it will have already been determined that this is not a suit against either the State of California or the State of Texas." Tex. Br. 13. As we will show, the Eleventh Amendment inquiry is quite distinct from the question of whether the interpleader action is barred by Section 1251(a). *See* Part I(B), *infra*. The logical threshold question is whether Congress has authorized an action such as this one to be brought in a federal district court. If it has not, then the Court need not and should not decide whether Congress *could* craft a statute for the precise purpose of providing for

district court resolution of multi-state domicile disputes.[1] Thus, in this circumstance in particular, the Court should reject Texas' suggestion that it decide a difficult constitutional question *before* considering a relatively straightforward statutory one. *See, e.g., Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979) (court below erred in reaching constitutional issue before reaching dispositive statutory issue); *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1949); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Accordingly, both logic and sound prudential considerations compel consideration of the statutory jurisdictional issue before the Court decides

---

1. As suggested in California's companion Motion for Leave to File Complaint in *California v. Texas*, No. 88, Orig., at pp. 37-38 n.18, Congress could create an express exception to the exclusivity of the Court's original jurisdiction which would provide a fair and workable procedure for the resolution of such controversies. Among other things, the peculiar jurisdictional problems discussed in our opening brief (*see* pp. 27-31) and the problem of venue—which under the venue provisions of the Interpleader Act would ordinarily result in the trial being held before a jury in one or the other of the claimant states (*see id.* at 10-17)—could be avoided.

The Eleventh Amendment problem might also be avoided if Congress enacted such a statute. If the statute provided for an action to be brought by one state against another, neither sovereign immunity nor the Eleventh Amendment would be a bar, for suits between states are "inherent in the constitutional plan." *Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934). While that observation was made of such suits brought in this Court, presumably it would be no less true if Congress exercised its power to create concurrent jurisdiction in the district court. Likewise, if a statute expressly authorized suit in the nature of interpleader to be brought against states by an estate representative, authority might be found in Section 5 of the Fourteenth Amendment. Were Congress to find, for example, that the due process rights of both the estate and the rival claimant states were jeopardized by the present lack of a suitable, certain forum with jurisdiction over all interested parties, Congress may well be able to override any immunity from suit otherwise afforded by the Eleventh Amendment. *See Hutto v. Finney*, 437 U.S. 678, 693-99 (1978) (attorneys' fee award authorized by federal statute and imposed against state treasury); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

Because the Eleventh Amendment issue would be cast in an entirely different light by a carefully drawn statute, the Court should be especially hesitant to reach the Eleventh Amendment issue presented in this case unless and until it has satisfied itself that Congress intended to authorize this kind of suit to be brought in a federal district court.

whether the Eleventh Amendment bars this action. We thus discuss the statutory issue raised by Texas' new position in Part I(B) before turning to the constitutional issue in Part II.

I.

THE DISTRICT COURT LACKS JURISDICTION BECAUSE THIS IS A "CONTROVERS[Y] BETWEEN TWO ... STATES" (28 U.S.C. § 1251(a)).

A. This Is a Controversy Between Two States.

The Estate defends the District Court's jurisdiction by asserting that the denial in 1978 of California's motion for leave to file necessarily established that the present statutory interpleader suit "is not yet a dispute between two states." Est. Br. 10. Citing Justice Stewart's concurring opinion, the Estate urges that this is a controversy between the Estate and each claimant state, and not a controversy between the states themselves. *Id.* at 11.

We do not know the grounds on which the Court denied leave to file the complaint in the prior action, as no opinion was written for the Court. Texas advanced many grounds of opposition which had nothing to do with the present issue of whether there was (let alone presently is) a controversy between California and Texas.[2] Justice Stewart's concurring opinion did argue that, *as matters then stood*, the real controversy was between each taxing state and the Estate, and not between California and Texas themselves. *See California v. Texas*, 437 U.S. 601, 611-12 (1978). Whether that analysis was or was not correct is entirely irrelevant here.[3] For so long as California and Texas can involuntarily be joined as defendants in a statutory interpleader suit, they are *ipso facto* compelled to participate in a controversy between

---

2. *E.g.*, Texas then urged that the conditional settlement agreement between California and the Estate (which, of course, is now no longer in effect) made the action collusive. *See* Tex. Brief in Opposition to Motion for Leave to File in *California v. Texas*, No. 76, Orig., at 8-11.

3. We discuss that analysis, and endeavor to persuade this Court of its errors of law and logic, in our companion Motion for Leave to File at pp. 28-39. For present purposes, however, we need only show that, whatever may be said of the situation which existed in 1978, or even of the present Motion for Leave to File, this statutory interpleader suit is the paradigm of a controversy between two states within the meaning of Section 1251(a). That is the burden of the discussion in the text above.

two states which under Section 1251(a) cannot be heard in a district court.

Justice Stewart's opinion described a situation which no longer exists. In 1978, there were separate tax proceedings pending in the California and Texas state courts. Neither state being a party to the proceedings in the other's state court, each was free to determine domicile, and impose death taxes, without concern for the acts of the other state. Thus Justice Stewart concluded that "it would be of no possible concern to either California or Texas that the other might adjudge Hughes a domiciliary and succeed in taxing his estate . . . ." 437 U.S. at 611.

That statement cannot possibly be made of the present circumstances. The Estate has filed a federal interpleader suit, joining as rival claimants both California and Texas. The independent state tax proceedings in the California and Texas state courts have been enjoined. The very predicate of this interpleader suit is that the respective state claims are mutually inconsistent (*see* Pet. Br. 17-18 and notes 22-23) and that no more than one state can prevail. Its purpose is to make the competing states—which previously were free to proceed without regard for the acts of the other state—litigation adversaries.

The error of the Estate's contention that this suit involves only a dispute between the Estate and each of the two claimant states can most easily be seen by considering the following hypothetical: suppose that States A and B each claims domicile, and each seeks to impose an 18% tax. The estate concedes that one or the other state was the true domicile, and interpleads the 18% tax. In this situation, in which the stakeholder is not "interested" because it makes no claims to the "fund", could there be any doubt that the *only* remaining controversy is between the claimant states? Indeed, in such circumstances, it is customary for the stakeholder to play no further role in the interpleader suit and to be dismissed. *See General Atomic Co. v. Duke Power Co.*, 553 F.2d 53, 56 (10th Cir. 1977); 3A MOORE'S FEDERAL PRACTICE (hereafter "MOORE") ¶ 27.14(1), at p. 22-124. This is done "so that the true dispute will be settled between the true disputants, the claimants." *Id.* ¶ 22.02[1] at pp. 22-4 to 22-5.

That example differs from this case because the Hughes Estate *is* "interested," and disputes the claims of both California and Texas. But the addition of a dispute between the Estate and the two states does not eliminate the controversy which exists between the two claimant states. That controversy which engulfs the state litigants remains squarely within Section 1251(a), for the exclusive original jurisdiction of this Court is not altered by the presence of state parties[4] *See, e.g., New Jersey v. New York*, 345 U.S. 369, 374-75 (1953) (city joined as additional party); *New York v. New Jersey*, 256 U.S. 296 (1921) (local sewage agency); *Texas v. Florida*, 306 U.S. 398 (1939). The last case is, of course, exactly on point. There, a multi-state domicile dispute between Texas, Florida, Massachusetts and New York was treated by the Court under its original jurisdiction even though the decedent's heirs at law were also joined as additional parties.

The indisputable reality is that if this interpleader action is allowed to proceed, California and Texas will be involuntary adversaries before the District Court. That conforms to the general understanding of, and practice in, the so-called "second stage" of interpleader. "At this juncture, *each claimant occupies an adversary position to the others* and must proceed accordingly." 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (hereafter "WRIGHT" § 1714 at 441-42 (emphasis added). "Each [interpleader claimant] must state his claim and answer that of the

4. This case does not present the question of whether a federal district court, having before it a case involving a state and other non-state parties, could allow the joinder of another state where the dispute between the two states is ancillary to the primary controversy. *See State Water Control Board v. Washington Suburban Sanitary Comm'n*, 61 F.R.D. 588 (D.D.C. 1974) (in suit between Virginia and a local commission, state of Maryland not permitted to intervene in opposition to Virginia because of exclusive jurisdiction provision of § 1251(a); theory of "ancillary jurisdiction" rejected). In such a case, it could be argued that Section 1251(a) does not preclude the exercise of such ancillary jurisdiction. Even if it did, Section 1251(a) would not preclude resolution of the primary dispute between the state and the non-state parties. In this case, by contrast, the controversy between the two states is not ancillary to, and cannot be severed from, the disputes between the Estate and each state. To the contrary, the controversy between California and Texas is at the heart of the interpleader action, and joinder of the two states was required not only by the statutory requirements of the Interpleader Act but also because, under Rule 19, the states are indispensable parties.

other so that the issue between them is joined." *Phoenix Mutual Life Insurance Co. v. Reich*, 75 F. Supp. 886, 889 (W.D. Pa. 1948); 3A MOORE ¶ 22.14[1] at p. 22-125 and n.1 and cases cited. Appropriately, then, the Estate—even as it denies the applicability of Section 1251(a)—acknowledges that "the tax officials' claims are certainly adverse to each other . . . ." Est. Br. 10.

For these reasons, it simply cannot be said that no controversy exists between California and Texas in the statutory interpleader suit the Estate has brought.

B. Section 1251(a) Is Not Avoided by the Device of Naming State Officers as Defendants Where the States Are Real Parties in Interest.

Texas offers a different argument: this case, it suggests, is not a controversy between states at all, but only a dispute between Kenneth Cory and Messrs. White and Bullock, the named state taxing officials. The suggestion would be ludicrous were we not so accustomed to the fiction of *Ex parte Young*, 209 U.S. 123 (1908). Texas urges that this fiction be extended to analysis under Section 1251(a)—that is, the official capacity in which the state tax officials have been sued (*see* A.1, 2-3) should be ignored. Tex. Br. 12-13.

Texas' argument is without merit, for two distinct reasons. The first is that whether an action is deemed to be against a state for purposes of the Eleventh Amendment involves issues and considerations entirely distinct from the question of whether it is a controversy between two states within the meaning of Section 1251(a). Eleventh Amendment analysis utilizes a fiction which cannot woodenly be transported to the analysis of other legal questions. Section B(1), *infra*. Moreover, even if the *Young* fiction were used for purposes of Section 1251(a) analysis, it would not apply here because the state taxing officials have not acted unconstitutionally in asserting their respective tax claims. Section B(2), *infra*.

1. THE FICTION OF EX PARTE YOUNG IS IRRELEVANT TO THE ISSUE OF EXCLUSIVE JURISDICTION UNDER SECTION 1251(a).

That *Ex parte Young* employed a fiction has been universally conceded. *See, e.g.*, 17 WRIGHT, *supra*, § 4231 at p. 359; 12 MOORE, *supra* ¶ 300.03[4.-1], at pp. 1-70 to 1-71; TRIBE,

AMERICAN CONSTITUTIONAL LAW 144, 146 (1978). The consequence was to make state governments subject to judicial enforcement of the Constitution. Thus the *Young* fiction was, as Professor Tribe has written, born of "evident necessity." *See id.* at 146. As such, it is an honorable fiction.[5] Texas urges that the same fiction should be extended to Section 1251(a) to transmogrify a strenuous controversy between the fiscal interests of California and Texas into something other than a "controvers[y] between two . . . states." Use of the *Young* fiction for that purpose is not supported by history or the "evident necessity" which propelled the Court in *Ex parte Young*. That history and necessity has been and should be the measure of the fiction's scope.[6]

---

5. It is also an ancient one. Professor Moore traces the roots of *Ex parte Young* to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and before that to English common law principles of sovereign immunity. 12 MOORE, *supra*, at pp. 1-70 to 1-71.

6. The *Young* fiction has not been extended to other circumstances. For example, shortly after *Young* was decided, the Court rejected the contention that a municipal ordinance challenged as violative of the Fourteenth Amendment must be sustained because the ordinance was contrary to *state* law and, hence, could not involve "state action." *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 288-89 (1913). Thus, although a suit challenging under the Fourteenth Amendment acts performed under a state law is brought against a state officer only upon the fiction that his allegedly illegal conduct is *ultra vires* (and thus the suit is not "against" the State for purposes of the Eleventh Amendment), that same *ultra vires* quality will not result in the conduct being stripped of its "state action" character for purposes of the Fourteenth Amendment. *Accord, Edelman v. Jordan*, 415 U.S. 651, 667 n. 12 (1974).

Likewise, under the original three-judge court statute, a court of three judges was required only where the injunction was sought against "any officer of such state." 36 Stat. 557 (1910), codified as Section 266 of the 1911 Judicial Code. The requirement did not apply where the defendant was a local official. *Ex parte Public National Bank*, 278 U.S. 101 (1928); *Wilentz v. Sovereign Camp., W.O.W.*, 306 U.S. 573 (1939). In many cases, the requirement of three judges was applied where it was alleged that the acts of the state officer were unconstitutional. *E.g., Stratton v. St. Louis Southwestern Railway*, 282 U.S. 10 (1930). Such suits were possible, of course, only through the fiction of *Ex parte Young*. Nevertheless, it was never suggested that a court of three judges was not required because the defendant was not sued as an "officer" of the state in light of the allegation of unconstitutional, and thus *ultra vires*, conduct.

The same fiction might have, but has never, been extended to the issue of immunity. For example, a judge whose acts resulting in the sterilization of a retarded person were unauthorized by statute or common law, and were contrary to due process requirements, is not by the *Young* fiction stripped of his official position in the eyes of the law and deprived of immunity. *See Stump v. Sparkman*, 435 U.S. 349 (1978).

But here, disregard of the realities of the situation in favor of a fiction would frustrate the clearly expressed will of Congress that lawsuits between two or more states be heard, if at all, in this Court.

It is no overstatement to say that if Texas' view were to prevail, Congress' stipulation that the Court's jurisdiction over controversies between two or more states be *exclusive* would be a dead letter. By the simple expedient of naming as the defendants one or more state officers rather than the state itself, any state having a dispute with another state in which prospective relief was sought could, at its election, bring suit in state or federal district court, perhaps in a court sitting in the plaintiff state.[7] The fiction in *Ex parte Young* served the essential purpose of providing a means by which federal constitutional rights could be secured in federal court. No comparable compelling purpose exists here.[8] Application of that fiction to Section 1251(a) would mean the unjustified evisceration of a clearly expressed Congressional requirement that no court save this one adjudicate disputes between sovereign states.[9]

---

7. *See Nevada v. Hall*, 440 U.S. 410 (1979) (Nevada subject to suit in the courts of California); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) (Idaho officials sued under long-arm jurisdiction in federal court sitting in Texas).

8. This domicile dispute occurred roughly 40 years after *Texas v. Florida*, 306, 398 (1939). It is unlikely that there will be another even forty years from now. For, in addition to the development of arbitration procedures for the resolution of such controversies (*see California v. Texas, supra*, 437 U.S. at 615 n. 15 (Stewart, J., concurring))—which California, but unfortunately not Texas, has adopted—recent changes in the federal tax laws make it exceedingly unlikely that claims exceeding the total assets of an estate will ever again be asserted. *See* Tex. Br. 20-21 (referring to the reduction of the maximum rate from 77% to 70%); Economic Recovery Act of 1981 § 402, Pub. L. 97-34 (reducing maximum rate from 70% to 50% over four-year period).

9. With little imagination, virtually any suit between states previously regarded as solely within the exclusive jurisdiction of this Court could be heard in a trial court at the plaintiff's option. Moreover, many such controversies, such as the one presented in *Maryland v. Louisiana*, ... U.S. ....., 49 U.S.L.W. 4383 (1981), could be structured as a statutory interpleader suit; in the circumstances of that case, for example, a pipeline company might have attempted to interplead Louisiana (the taxing state) and Maryland (a consumer state which reimbursed the pipeline company for the challenged tax). As a result, controversies which in fact pit state against state could be instituted by a private litigant at a time and in a venue selected by that private litigant.

The history of Section 1251(a) is unambiguous. Gradually, Congress has made most categories within the Court's original jurisdiction subject to the concurrent jurisdiction of other courts. *See* 28 U.S.C. § 1251(b). But it has insisted that the Court's jurisdiction over controversies between states remain exclusive. *See* Pet. Br. 22-23. Indeed, only once has Congress crafted an exception to that exclusive jurisdiction—and then only by a statute which conditions district court jurisdiction on the defendant state's *consent*. *See* Pet. Br. 23 n.31. If states are to be stripped of their right to have suits brought against them by other states heard in this Court, and not in the federal district or state court of plaintiff's choice, Congress must do it. A fiction born of genuine necessity, and in another era, may not woodenly be imported into Section 1251(a) to achieve that end.

2. THE DEFENDANT OFFICIALS HAVE NOT ACTED UNCONSTITUTIONALLY.

Even if the *Young* fiction did apply to analysis under Section 1251(a), the state taxing officials have not engaged in unconstitutional or illegal conduct such as would separate them from their respective state employers. That fiction is premised upon unconstitutional or illegal conduct on the part of the state officer; in such circumstances, it is said, the nexus to the state is absent and the Eleventh Amendment does not prohibit suit (at least for prospective relief) against the officer.

But no such illegal or unconstitutional conduct is present here. The Estate's conclusory assertions to the contrary are totally foreclosed by consistent precedent, both long-standing and recent. Here, two states have asserted inconsistent claims of domicile with respect to a decedent whose life made that question an uncertain one. More than forty years ago, the Court rejected a contention that the assertion of such claims violates the Constitution. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). Whatever may be said of *Worcester County's* Eleventh Amendment analysis,[10] its rejection of the constitutional claim has never been questioned:

---

10. We recognize, of course, that the Court of Appeals accepted the Estate's argument that the Eleventh Amendment does not bar this action, and that *Worcester County* had been overruled by *Edelman v. Jordan*,

"Petitioner's [the executor's] contention is that here the prospective official action of respondents involves a threatened violation of the Constitution for which state law can afford no sanction. It is said that as the officers of each state assert the right to collect the tax out of decedent's property within the state, they may succeed in establishing that right by a judicial determination in each that decedent was last domiciled there, . . . and petitioner is thus exposed to the danger of double taxation, which the Constitution forbids.

* * * *

"But this argument confuses the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall, with other types of action by state officers, which, because it passes beyond the limits of a lawful authority, is within the reach of the Federal judicial power notwithstanding the Eleventh Amendment. . . .

* * * *

". . . [T]*he Constitution of the United States does not guarantee that the decisions of state courts shall be free from error*, . . . or require that pronouncements shall be consistent. . . . Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries. . . . *Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States.*" (*Id.* at 297-99) (citations omitted, emphasis added))."

The Estate seeks to distinguish the *Worcester County* case. *Worcester County*, it says, was a dispute which involved two

---

supra. But it is important to understand that the ground on which Justice Stewart urged, and the Court of Appeals held, the Eleventh Amendment to be inapplicable is quite distinct from the issue we are now discussing. Neither Justice Stewart nor the Court of Appeals suggested that the state tax officials were acting unconstitutionally or illegally. (Indeed, Justice Stewart concluded that they were not. *See* 437 U.S. at 612). Rather, the Court of Appeals held that *Edelman* created a *second* exception to the Eleventh Amendment: even though the state officer is not acting illegally so that his nexus to the state may be disregarded, where "only prospective, equitable relief [is sought] the eleventh amendment does not preclude [the] suit." *Lummis v. White*, 629 F.2d 397, 402 (5th Cir. 1980); Pet. App. 8a.

states, one of which was *conceded* to be the domicile; here, by contrast, the Estate denies the domicile claims of *both* California and Texas. The asserted significance of this fact is that in *Worcester County*, but not in the present case, at least one of the states was acting lawfully; here, neither state's claim is valid. Est. Br. 24-26.

With all respect, this supposed ground of distinction is utterly specious. In the first place, the *Worcester County* opinion permits no such distinction; the whole point of the Court's analysis was that the assertion of factually erroneous claims by state taxing officials does not violate the Constitution. Moreover, the logic of the Estate's revisionist analysis of *Worcester County* does not survive scrutiny. By the Estate's account, the complaint in *Worcester County* at least alleged that one of the two states was not the state of domicile; yet the opinion holds that no tenable federal claim was asserted against *either* of the two states.

The rejection of this constitutional claim in *Worcester County* states a bedrock principle of our federal system. Federal questions are not stated merely by alleging that a state court has decided a question of state law incorrectly, let alone that an unadjudicated *claim* made in a state court by a governmental litigant is factually erroneous.[11] "Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 555 (1962). Like the taxing officials in *Worcester County*, the Texas and California taxing officials "propose to do [no] more than invoke the action of [their] courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in [their jurisdiction] as the basis of [their] power to impose the tax." 302 U.S. at 298-99.

---

11. The Court has always held that "an erroneous decision of a state court does not deprive the unsuccessful party of . . . due process of law, within the 14th Amendment of the Constitution of the United States." *Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895). "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions . . . ." *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 166 (1917). *See also Bishop v. Wood*, 426 U.S. 341, 347-50 (1976) ("The Due Process Clause . . . is not a guarantee against incorrect or ill-advised [administrative] decisions"); *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *Texas v. Florida*, 306 U.S. 398, 410-11 (1939); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). *A fortiori*, the mere institution of a case based upon a claim which is ultimately found to be unsound does not violate the Constitution.

The Estate also argues that assertion of the state tax claims violated the Estate's due process rights under *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961) because neither state can, in its own courts, protect the Estate from the conflicting claim of the other state. Est. Br. 18-20. That contention is also foreclosed by *Worcester County* and *California v. Texas, supra*.

In *Worcester County*, as in this case, the estate alleged that it was "exposed to the danger of double taxation, which the Constitution forbids." 302 U.S. at 297. The Court unambiguously rejected this claim. This aspect of its holding has never been questioned. Indeed, it was reaffirmed in the concurring opinion of Justice Stewart in *California v. Texas, supra*, which emphatically states: "[T]here is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes Estate by proceedings in their own courts." 437 U.S. at 612 n.13 (Stewart, J., concurring). Moreover, Justice Stewart wrote, "the dilemma of multiple taxation arises only because the Constitution *permits both States to impose the tax*." *Id.* at 612 (emphasis added).

Western Union dealt with the escheat of tangible property and held that a state denies due process "if [the holder] is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *Id.* at 75. Instead, states with such claims are compelled to institute an original proceeding in this Court, where rival claimant states can be joined. *Id.* at 79-80. Neither *Western Union* nor any other case holds that a state may not seek to levy a death tax on an estate—a claim not aimed at confiscating specific property but merely one seeking payment of money—merely because another state may do likewise. No case has ever extended *Western Union* to circumstances other than escheat.

The Estate's *Western Union* argument is not without irony. It will be recalled that when California attempted to invoke the Court's original jurisdiction in *California v. Texas, supra*, it called attention to *Western Union*, pointing out that *if Western Union* applied to multi-state domicile disputes, then California was obliged to seek a unitary adjudication of domicile in this Court, and the Court was *obliged* to exercise its original jurisdiction and resolve the controversy. *See* California's Reply to Brief in Oppo-

sition to Motion for Leave to File Complaint at 15-16.[12] Surely a state which has unsuccessfully attempted to invoke the Court's original jurisdiction does not violate the Constitution by thereafter proceeding in its own courts on its death tax claim.

The Estate's position would lock the states in an impossible, "Catch-22" situation. Knowledge of a rival state claim would bar a state from proceeding in its own courts to assert a bona fide death tax claim. Yet, so long as *California v. Texas* is the last word on the availability of original jurisdiction, the state could not do as *Western Union* anticipated and initiate suit in this Court against the rival state. Nor could a state seek relief under the Interpleader Act, as only a stakeholder may initiate such suits.[13] With all states barred from asserting a tax, no estate representative or heir would have an incentive to initiate a federal interpleader suit, even if one were available. Surely the Due Process Clause does not bar states from proceeding in their own courts where no alternative forum or procedure is available to them as of right.

Accordingly, the Estate's claims of unconstitutional conduct by the state taxing officials are totally without merit.[14] Even if the *Ex parte Young* fiction were applicable to analysis of whether a controversy is one between states within the meaning of Section 1251(a), the clear absence of unconstitutional or

---

12. Justice Stewart's concurring opinion in *California v. Texas* found no merit in the analogy to *Western Union:*

> "In *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, the Court held, by contrast, that a holder of tangible property is denied due process by a state-court judgment of escheat that does not and cannot protect the holder from the escheat claim of another State, and that the proper procedure was for the competing States to invoke the original jurisdiction of this Court. Because the Court held that the States could not constitutionally enforce their escheat laws in their own courts, this Court was the only remaining forum in which a State could escheat property that other States claimed. *The situation in which the present case arises is quite different, since there is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes estate by proceedings in their own courts.*" (437 U.S. at 612 n. 13) (emphasis added).

13. 28 U.S.C. § 1335 permits an interpleader suit to be brought only by a "person, firm, or corporation, association or society having in his or its custody or possession money or property" claimed by "[t]wo or more adverse claimants. . . ." No statutory authority is given *claimants* to initiate interpleader proceedings.

14. The Estate also argues that attempts by Texas and California to collect a domicile-based tax penalize the decedent for exercise of his right to travel. This claim is without merit. Obviously, the possibility of multi-

illegal conduct dooms the Estate's claim that Section 1251(a) does not bar district court jurisdiction over this action.[15]

---

ple domicile-based inheritance tax claims did not deter Mr. Hughes from vigorous exercise of his right to travel. Nor would such claims penalize Hughes' exercise of that right. In the first place, California does not seek to tax the Estate because Hughes travelled *out* of California, but because he lived *in* it. Moreover, the overwhelming majority of individuals who engage in interstate travel do so without creating uncertainty as to their domicile. The assertion of multiple claims in this case has not occurred because of where Hughes travelled, but how he lived. In the usual case, a person's domicile may be ascertained, *inter alia*, from his community interests, social life, professional and personal relations, civic ties and the like. But Howard Hughes lived an unusual life and, especially in the later years, possessed none of the usual indicia of domicile. There is no constitutional right to be a multinational recluse. If determining Hughes' legal domicile is difficult in this case, it is due to the peculiar facts of this unusual man's life, and not because the decedent's right to travel is being penalized.

15. If the Court agrees that district court jurisdiction is precluded by Section 1251(a), the issue of whether the Court will permit the invocation of its original jurisdiction would then be presented. That is the subject of California's pending Motion For Leave to File in *California v. Texas*, No. 88, Orig. As we endeavored to point out in our opening brief, the issues are distinct and a determination that Section 1251(a) precludes the instant suit would not necessarily compel the Court to grant the motion. Pet. Br. 25-26.

Because the issues are distinct, the discussion at pp. 18-24 of Texas' brief—in which it is urged that the Court should permit "state courts . . . to resolve these controversies" (*id.* at 18) rather than entertain an original suit in this Court—is inappropriate. We do feel compelled, however, to respond to the suggestion that the Texas probate court has acquired jurisdiction over California and, therefore, could determine domicile in a unitary proceeding binding both California and Texas. Tex. Br. 22-24. That contention is preposterous.

In the first place, at the time of the request for temporary custody of the exhibits, the domicile trial had long been concluded, and California was not named in any pleading as a party to the Texas case. Texas has cited no authority, and we know of none, holding that an act which would constitute an appearance if performed by one who was named as a party in the complaint would also constitute an appearance if performed by a total stranger to the proceedings. Obviously, one who is named in a complaint but who has not been served enters the courtroom at its peril. California was not in that position.

Moreover, the so-called "voluntary appearance" by California was nothing of the kind. The facts are these: In connection with a deposition to perpetuate testimony to be taken in this federal action, California's counsel asked its Texas attorneys to arrange for temporary custody of certain photographs which had been admitted in evidence in the prior Texas domicile trial. Texas counsel, in his own name, obtained an order from the Texas court giving him temporary custody of exhibits. Texas counsel did not purport to "appear" for anybody, and sought no relief from the

II.

THIS ACTION IS BARRED BY THE ELEVENTH AMENDMENT

Responding to the contention (Pet. Br. 36-37) that even though only prospective relief is sought, the Eleventh Amendment nonetheless bars an action where the defendant state officer has not acted unconstitutionally or illegally, the Estate makes two points. First, it asserts that the defendant state officers have in fact acted unconstitutionally. Further, it suggests that after *Edelman v. Jordan*, 415 U.S. 651 (1974), "allegations of unconstitutionality or other illegality may not be necessary in this interpleader action which seeks only prospective relief against state officials." Est. Br. at 17.

We have already dealt with the first of these points. *See* pp. 9-14, *supra*. As we have shown, the good faith assertion of inconsistent domicile claims by the respective state officers was neither unconstitutional nor illegal. Thus the asserted inapplicability of the Eleventh Amendment turns on whether *Edelman* has dispensed with the necessity that the plaintiff establish that the state is not the real party in interest because the defendant state officer, sued in his official capacity, acted unconstitutionally or illegally.[16]

Texas court relating to any issue in the state litigation. As already noted, the Texas state court had long ago completed its trial of the domicile issue; that matter is before the Texas appellate court (and has been stayed in connection with the federal interpleader action).

It is self-evident that a request to inspect or obtain temporary custody of a public record for use in federal litigation cannot possibly constitute a general appearance in the state court. The request of Texas counsel did not constitute a "step in the regular proceeding." 5 AM. JUR. 2d, *Appearance* § 5 at 482 (1975); it bore no "substantial relationship to the cause," nor was it detrimental to any party to the probate court action. 6 C.J.S. *Appearance* § 4 at 7 (1979). By seeking temporary custody of documents for use elsewhere, counsel did not "call[] into being the exercise of [the state court's] judicial function." *Pacific American Gasoline Co. of Texas v. Miller*, 61 S.W. 2d 1024 (Tex. Civ. App. 1933). Indeed, several courts have held that an act such as the one at issue does not constitute a general appearance. *Cox v. Pabst Brewing Company*, 152 Kan. 375, 103 P.2d 871 (1940) (defendant's petition for a copy of plaintiff's complaint not a general appearance); *Vincent v. Penrod Drilling Co.*, 372 So. 2d 807 (La. App. 1979) (answer to interrogatory is not an appearance, despite defendant's failure to expressly challenge jurisdiction); *Investors Diversified Services, Inc. v. Bruner*, 366 S.W.2d 810 (Tex. Civ. App. 1963) (letter to court setting out facts relating to errors in service not general appearance).

16. Contrary to the Estate, California did not waive the Eleventh Amendment defense. To the contrary, the defense was expressly asserted

The Estate does not explain in its brief, nor did the Court of Appeals in its opinion, what in *Edelman* dispensed with the historic requirement that unconstitutional or illegal conduct by the state officer be shown.[17] Nor, with all respect, do the concurring opinions of Justices Stewart and Powell in *California v. Texas, supra*, on which the Estate relies.[18] The *holding* of *Edelman*, of course, provides no comfort; in that case, the state officers had been found to have acted unlawfully. Doubtless for that reason, neither the Estate's brief, the opinion of the Court below, nor the *California v. Texas* concurring opinions quote any portion of the Court's opinion in *Edelman* to support the proposition that the

---

in the District Court. *See* A. 76. There California advised the District Court that it would have submitted to the jurisdiction of a federal court sitting in a non-claimant state, but that in the absence of a disinterested forum it "cannot agree that the Eleventh Amendment does not apply in this case." The remarks of counsel quoted by the Estate (Est. Br. 14 n. 8; *see also* Tex. Br. 13-14 n. 4), though ill-stated, were intended to convey the same point as was made to the District Court (and more fully in California's brief in the Court of Appeals): that California favored a unitary adjudication of domicile in a disinterested forum and that if the action were transferred to a disinterested forum, no Eleventh Amendment claim would be asserted by California. Obviously, the circumstance under which California envisioned submission to a district court's jurisdiction—transfer to a disinterested forum—has not yet occurred.

Even if counsel had uniquivocally agreed to waive the Eleventh Amendment, the issue would nonetheless remain for resolution by this Court. In the first place, in the absence of a transfer to a disinterested forum, counsel had no authority from Petitioner Cory to waive the Eleventh Amendment rights of California. California's immunity thus could not be waived by the remarks of counsel. *See, e.g., Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 466-70 (1945); *Linkenhoker v. Weinberger*, 529 F.2d 51, 53-54 (4th Cir. 1975); *Williams v. Eaton*, 443 F.2d 422, 428 (10th Cir. 1971). Moreover, Texas has asserted the Eleventh Amendment in the District Court, the Court of Appeals, and in this Court. Therefore, the issue is before the Court.

17. With respect to this requirement, Professor Moore describes the post-*Edelman* law as follows:

> "To summarize, the Eleventh Amendment does not apply to suits against state officials in which, (1) it is alleged that a state official has acted pursuant to an unconstitutional statute or in a manner not authorized by statue, *and* (2) prospective injunctive relief is being sought." (12 MOORE, *supra*, ¶300.03[4] at p.1-79 (emphasis in original)).

18. As is also the case with the Section 1251(a) issue discussed previously, the *Edelman*/Eleventh Amendment issue was neither briefed nor argued by the parties in *California v. Texas*.

Eleventh Amendment has no application whatever where only prospective relief is sought even though no illegal conduct is involved. And while *Edelman*, and cases subsequent to it cited by the Estate (*see* Est. Br. at 16), have focused on the relief sought, in each instance the underlying cause of action was based on unconstitutional or illegal conduct by the defendant officers.

Admittedly, the distinction between this case and those involving unconstitutional conduct is a narrow one. But it nevertheless is significant. The Eleventh Amendment states in unequivocal terms that suits may not be brought in federal court "against one of the United States"; that prohibition has long been understood to apply even though a state officer, and not the state, is a party of record. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).[19] *Ex parte Young* utilized the *ultra vires* fiction, thereby allowing courts to disregard the interest of the state where unconstitutional acts were charged, so that "the Civil War Amendments to the Constitution [could] serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman v. Jordan, supra*, at 664. That fiction is not available where unconstitutional or illegal conduct is not involved. In this case, there is neither the "evident necessity" (TRIBE, *supra*, at 146) which gave birth to the *Young* fiction nor any other compelling reason which could possibly justify a novel and strained construction of the Amendment.

Until this case, no decision of any court has found the Eleventh Amendment inapplicable to a suit against a state officer where unconstitutional or illegal conduct was not alleged. In this case, no one seriously disputes that the states of California and Texas are the real parties in interest even though only prospective relief is sought; and neither history, precedent or the fiction of *Ex parte Young* can be summoned to make this suit anything less than a suit "against [two] of the United States."

---

19. There the Court said:

"It is well established that the Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. [Citations.] Its applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" (*Id.*, quoting from *Ex parte New York*, 256 U.S. 490, 500 (1921)).

III.

THE ELIMINATION OF ONE OF THE TWO "CLAIMANTS" DESTROYS THE JURISDICTIONAL BASIS FOUND BY THE COURT OF APPEALS

As explained in our opening brief, the Court of Appeals was able to find subject matter jurisdiction under 28 U.S.C. § 1335 only by (1) treating the stakeholder as a "claimant"; and (2) finding a second "claimant" who was also a citizen of a state in Petitioner Alvord, the Los Angeles County Treasurer. However, after the Court of Appeals' decision was announced Alvord's nominal interest in the fund was eliminated by a comprehensive revision of California's inheritance tax law. *See* Pet. Br. 32-33. Thus Alvord will make no claim against the Estate, and must be dismissed as a party. Because this leaves only *one* claimant which is also a citizen of a state, the requirement for jurisdiction under Section 1335 is simply not satisfied. *Id.*

Respondents assert that jurisdiction is measured as of the date the complaint is filed. Est. Br. 36-37; Tex. Br. 17. However, we have shown that the courts apply a different rule where subsequent events cause the joinder or dismissal of a party, in which event jurisdiction is re-determined in light of that change in parties. *See* Pet. Br. 33-35. Neither of the Respondents quarrels with our description of the six different categories of cases in which this jurisdictional principle has been applied.[20]

---

20. Texas ignores these authorities. The Estate seeks to distinguish them on the ground that they involve only the joinder of indispensable parties or the dismissal of non-indispensable parties and therefore the point at which jurisdiction is measured is "the first time at which the case has been structured as it should have been at the time of commencement." Est. Br. 37 (emphasis omitted). That explanation may apply to some of the cases, but it plainly does not explain all of them. The Estate's characterization does not apply to the *Stanhope, Reynolds* or *Knapp-Monarch* cases described at Pet. Br. 33, ¶1 and n.41; the cases described at *id.* ¶2 and n.42; or the cases described in *id.* ¶6 at 34 and n.46. In these cases, the *permissive* joinder or intervention of non-indispensable parties required the re-determination of jurisdiction.

For a recent example of a post-complaint event which destroyed diversity jurisdiction, *see Desert Empire Bank v. Insurance Company of North America*, 623 F.2d 1371 (1980). In that case, plaintiff obtained leave of court to join an additional and non-diverse party. The Court of Appeals, which viewed that party as a "proper" one but not necessarily one whose presence was required (*see* 623 F.2d at 1374), held that jurisdiction was "destroyed at the moment" of joinder. *Id.*

The Estate suggests that a re-examination of jurisdiction in these circumstances "raises the troublesome problem that . . . state legislatures could exempt officials from suit in federal court by eradicating or otherwise altering the officials' duties after commencement of an action." Est. Br. 36 n.26. Neither Respondent asserts, however, that the revision of California's inheritance tax law had anything whatever to do with the jurisdictional issue pending in this case, and that manifestly is not the case. *See* Pet. Br. 32 n.40. The unlikely possibility that in some other case a state legislature might adopt legislation for the improper purpose of defeating federal interpleader jurisdiction is not a justification for ignoring the California law revision, which bore no relation to this litigation, that has terminated Alvord's claim to a tiny fraction of the fund. The Estate's implication—that a bright-line rule is necessary to protect against an occasional manipulative act affecting jurisdiction—is unwarranted. State legislatures are not known for their ability to move furtively, and the courts are not powerless to correct an abuse if one should occur.[21] Nothing of that nature is involved in the circumstances of this case.[22]

---

21. The law is not without remedy against collusive or manipulative acts designed to affect federal jurisdiction. *See* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court"); *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969) (transfer by foreign corporation to citizen of Texas for purpose of creating diversity jurisdiction not permitted to create jurisdiction); *Picquet v. Amoco Production Co.*, 513 F. Supp. 938, 941-943 (M.D. La. 1981) and cases cited at 942 (transfer of interest to corporate plaintiff for purpose of defeating diversity jurisdiction not effective for that purpose); *Gentile v. Lamb-Weston, Inc.*, 302 F. Supp. 161 (D. Maine 1969) (same); 3A MOORE ¶ 17.05[2].

22. If the Court finds that this action is barred by 28 U.S.C. § 1251(a) or by the Eleventh Amendment, or that interpleader jurisdiction was destroyed by termination of Alvord's status as a "claimant," it will be unnecessary to reach the issue of whether the suit should have been transferred to a neutral forum.

On that issue, Texas makes one point requiring a response. It argues that even if the heirs are added as parties, the record does not sufficiently establish that any of them resided in Colorado on July 14, 1978, the date the Complaint was filed, and hence the action cannot be transferred to a federal court sitting in Colorado. Tex. Br. 35-38. This contention is baseless. The record contains an affidavit of counsel stating that (1) in 1977 an heir executed an amendment to the inter-heir settlement in Colorado; and (2) counsel had been informed by counsel for the Estate that an heir "presently" resides in Colorado.

Texas did not object to the sufficiency of this proof in the District Court. For the first time on appeal, it asserted that (1) the heir *might* have executed the agreement in a place other than that of his residence;

(*Continued*)

DATED: December 9, 1981

Respectfully,

JEROME B. FALK, JR.*
MARTIN R. GLICK
STEVEN L. MAYER
HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK
A Professional Corporation
650 California Street, Suite 2900
San Francisco, CA 94108
(415) 434-1600

Of Counsel:

MYRON SIEDORF
Chief Inheritance Tax Attorney
Division of Tax Administration
Office of the State Controller
State of California

DONALD SCOTT THOMAS
RHONDA H. BRINK
PAUL J. VAN OSSELAER
CLARK, THOMAS, WINTERS & SHAPIRO
Capital National Bank Building
Post Office Box 1148; 12th Floor
Austin, Texas 78767
(512) 472-8422

Attorneys for Petitioners

*Counsel of Record

---

and (2) the evidence based on the statement of counsel for the Estate is insufficient because it does not specify the date of residence. Although the courts below rejected California's position on the transfer to Colorado, neither did so on that ground. Rather, the briefing and argument in the District Court went to the merits of the motion. Had Texas raised that issue, any ambiguities in the affidavit of counsel could easily have been corrected; and further evidence could have been taken if necessary. Instead, the evidence submitted was undisputed. Absent contrary evidence, this showing was sufficient to establish that an heir resided in Colorado on July 14, 1978. It established that an heir was present in Colorado in 1977 and executed an important document there; this was coupled with a statement—made on August 24, 1978, only forty-one days after the relevant date—that counsel for the Estate had advised that the heir "presently" resides in Colorado. This evidence tends to show, and is sufficiently probative of, the ultimate fact—a Colorado residence of the heir on July 14, 1978. *See* F.R. EVID. 401.

Moreover, public records, which this Court can judicially notice (*see* F.R. EVID. 201), unequivocally establish the residence of the heir, John McIntosh Houstoun, both before and after the filing date. California brought these records to the attention of the Court of Appeals. *See* Request for Judicial Notice, A. 141-44. Attached to that request were copies of Colorado voting records, as well as excerpts from telephone directories for 1977, 1978 and 1979, showing Mr. Houstoun's Colorado residence when the complaint was filed. Thus if the heirs are joined, as required by Rule 19 (*see* Pet. Br. 39-45), transfer to Colorado under Section 1404(a) would be appropriate.